(19,127.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 137.

THE CITY OF OKLAHOMA CITY, PLAINTIFF IN ERROR,

vs.

FRANK McMASTER.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } Return on Writ of Error.

In pursuance to the command of the writ of error within, I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, herewith transmit a true and correct copy of the opinion and judgment of the supreme court of the Territory of Oklahoma, together with a true copy of all of the records and proceedings and all pleadings, papers and files in said cause filed and recorded in my office as clerk of said court in the above entitled cause and I also transmit herewith the copy of assignment of errors and original writ of error and citation and proof of service thereof in said cause, lately pending in the supreme court of the Territory of Oklahoma, and also one of the copies of the brief of plaintiff in error first originally filed in said cause on December 6th, 1901, all under my hand and the seal of said court.

Witness my official signature and the seal of said supreme court at the city of Guthrie in said Territory of Oklahoma, this 28th day of October, in the year of our Lord, one thousand, nine hundred and three.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

b In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frank McMaster, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein The City of Oklahoma City is plaintiff in error and you are the defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the

said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

Witness the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma this tenth day of October, A. D. 1903.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

I hereby acknowledge service of the above and foregoing citation this — day of October, A. D. 1903.

——— ———,
Defendant in Error.

c TERRITORY OF OKLAHOMA, } ss:
County of Comanche, }

Received the annexed citation on the 13" day of October, 1903, and served the same on Frank McMaster therein named, by delivering to him a certified copy of this citation, with all the endorsements thereon, on the 14" day of Oct. 1903, in said county dated this 14 day of October, 1903.

C. C. HAMMONDS,
Sheriff of Comanche Co., O. T.
By E. E. JAYNE,
Deputy Sheriff.

Fees.

1st person	50
1 copy	25
Total	75

d [Endorsed:] 1126 City of Oklahoma City, *vs.* Frank McMaster Citation and service thereof. Filed Oct, 15 1903 Benj. F. Hegler clerk supreme court. By Jessie Pardoe deputy.

1 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

Petition for Writ of Error and Appeal.

To the honorable supreme court of the Territory of Oklahoma:

The above named plaintiff in error, conceiving itself aggrieved by the judgment of the supreme court of the Territory of Oklahoma

rendered on the sixth day of June, 1903, affirming judgment of the district court of Oklahoma county, in the Territory of Oklahoma, in rendering and entering a certain judgment for the defendant in error and the orders therein, for the recovery of certain real estate described in the petition of the defendant in error and in said judgment, and for the possession of said real estate, and for damages for the use of said property, and costs, and in overruling the motion of plaintiff in error for a new trial in said cause and in not sustaining the demurrer filed by the plaintiff in error to the petition of said defendant in error, and in sustaining the motion of the defendant in error to vacate a certain order and judgment rendered in said cause granting plaintiff in error, the defendant in the trial court, a second trial in said cause, and in reinstating the judgment rendered in the trial court for the recovery of said real estate and damages, and in admitting in evidence against the plaintiff in error, and over its objection on the trial of the said cause, a copy of a certain pretended judgment of the district court of Canadian county, purporting to have been rendered in the district court of Canadian county,
2 in an action in which this defendant in error was plaintiff and the Townsite Trustees Edgar N. Sweet, Levi E. Coe, and David H. Hammonds of Board No. 2, and their successors, were defendants, and in admitting evidence against the plaintiff in error and over its objections a copy of a certain order for a judgment, purporting to be a judgment or order of the district court of Canadian county, made in Kingfisher county in an action in which said defendant in error was the plaintiff and the said Townsite Trustees Edgar N. Sweet, Levi E. Coe, and David H. Hammonds of Board No. 2, and their successors, were the defendants, and in the admission of incompetent, irrelevant and immaterial evidence upon the trial of said cause, and in not rendering judgment in said cause for the plaintiff in error on the evidence introduced on the trial of said cause and in rendering judgment against the plaintiff in error and in favor of the defendant in error, does hereby prosecute proceedings in error and appeal from said orders, judgments and decrees of the supreme court of the Territory of Oklahoma, to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith and made a part hereof, and he prays that a writ of error and appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said judgment of affirmance was made, duly authenticated by the clerk of this court, may be sent to the Supreme Court of the United States and that the court may affix a supersedeas bond of the said plaintiff in error, to be given upon a reasonable time and enter the necessary orders herein, allowing and effecting proceedings in error and appeal and that the
3 said judgment of the supreme court of the Territory of Oklahoma be reversed and a judgment and decree be made remanding said cause for the further proceedings in error and appeal in the supreme court of the Territory of Oklahoma and in the trial

court and for new trial therein, or that such other decree may be made as — said honorable court may seem legal, just and proper.

A. G. C. BIERER,
DALE & BIERER, AND
C. PORTER JOHNSON,
Attorneys for Plaintiff in Error.
S. A. McGINNIS,
City Attorney in and for Oklahoma City, O. T.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Petition for writ of error and appeal. Filed Oct. 10—1904—Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

4 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

G. B. Stone, being first duly sworn says: That he is a resident of Oklahoma City in Oklahoma county in Oklahoma Territory, and is well acquainted with the premises involved in this action, being a tract of land in the southeast quarter of section thirty-three (33) in township twelve (12) north of range three (3) west in Oklahoma county, Oklahoma Territory, more particularly described as follows: Commencing at a point in said city of Oklahoma City on the southeast corner of block twenty-three (23) as shown by the trustees' plat, being now in use of said city and running thence southerly on a straight line with the west line of Broadway street as shown by said plat thirty-three and ten one-hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning one hundred and forty (140) feet; thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with said east and west line first named one hundred and forty (140) feet; thence north parallel with the said north and south line fifty (50) feet to the place of beginning, and that he is acquainted with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of said land in question, as well as the value of said described tract and that said tract of land is of the market value and is reasonably worth at least six thousand dollars ($6000.00) and that the value of said tract of land exceeds five thousand dollars ($5000.00) and that
5 the amount in controversy between the parties hereto, exclusive of costs and interest, is more than five thousand dollars ($5000.00).

G. B. STONE.

Subscribed and sworn to before me this 6th day of October A. D. 1903.

H. M. BATCHELDER,
Notary Public.

My com. expires Mar. 16, 1907.

[SEAL.]

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Affidavit of G. B. Stone, as to amount in controversy—Filed Oct. 10, 1903—Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

6 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

F. M. Gault being first duly sworn, says: That he is a resident of Oklahoma City in Oklahoma county, in Oklahoma Territory, and is well acquainted with the premises involved in this action, being a tract of land in the southeast quarter of section thirty-three (33) in township twelve (12) north of range three (3) west in Oklahoma county, Oklahoma Territory, more particularly described as follows: Commencing at a point in said city of Oklahoma City on the southeast corner of block twenty-three (23) as shown by the trustees' plat, being the plat now in use of said city and, running thence southerly on a straight line with the west line of Broadway street, as shown by said plat, thirty-three and ten one-hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning one hundred and forty (140) feet; thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with said east and west line first named, one hundred and forty (140) feet; thence north parallel with the said north and south line fifty (50) feet to the place of beginning, and that he is acquainted with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of said land in question, as well as the value of said described tract and that said tract of land is of the market value and is reasonably worth at least six thousand dollars ($6000.00) and that the value of
7 said tract of land exceeds five thousand dollars ($5000.00) and that the amount in controversy between the parties hereto, exclusive of costs and interest, is more than five thousand dollars ($5000.00).

F. M. GAULT.

Subscribed in my presence and sworn to before me this 6th day of October, A. D. 1903.

[SEAL.] N. E. DE MOSS,
Notary Public.

My com. expires Sept. 10, 1907.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Affidavit of F. M. Gault as to amount in controversy.—Filed Oct. 10, 1903—Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, *deputy*.

8 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

C. F. Colcord, being first duly sworn, says: That he is a resident of Oklahoma City in Oklahoma county in Oklahoma Territory, and is well acquainted with the premises involved in this action, being a tract of land in the southeast quarter of section thirty-three (33) in township twelve (12) north of range three (3) west in Oklahoma county, Oklahoma Territory, more particularly described as follows: Commencing at a point in said city of Oklahoma City on the southeast corner of block twenty-three (23) as shown by the trustees' plat, being the plat now in use of said city and running thence southerly on a straight line with the west line of Broadway street as shown by said plat, thirty-three and ten one-hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning one hundred and forty (140) feet; thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with said east and west line first named one hundred and forty (140) feet; thence north parallel with the said north and south line fifty (50) feet to the place of beginning, and that he is acquainted with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of said land in question, as well as the value of said described tract and that said tract of land is of the market value and is reasonably worth at least six thousand dollars ($6000.00) and that the
9 value of said tract of land exceeds five thousand dollars ($5000.00) and that the amount in controversy between the parties hereto, exclusive of costs and interest, is more than five thousand dollars ($5000.00).

C. F. COLCORD.

Subscribed and sworn to before me this 6th day of October A. D. 1903.

EDWIN G. BEDFORD,
Notary Public.

[SEAL.]

My com. expires May 15, 1907.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Affidavit of C. F. Colcord as to amount in controversy—Filed Oct. 10, 1903—Benj. F. Hegler, clerk supreme court by Jessie Pardoe, deputy.

10 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

J. L. Wilkin being first duly sworn says: That he is a resident of Oklahoma City in Oklahoma county, in Oklahoma Territory, and is well acquainted with the premises involved in this action, being a tract of land in the southeast quarter of section thirty-three (33) in township twelve (12) north of range three (3) west in Oklahoma county, Oklahoma Territory, more particularly described as follows: Commencing at a point in said city of Oklahoma City on the southeast corner of block twenty-three (23) as shown by the trustees' plat, being the plat now in use of said city, and running thence southerly on a straight line with the west line of Broadway street, as shown by said plat, thirty-three and ten one-hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning one hundred and forty (140) feet; thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with said east and west line first named, one hundred and forty (140) feet; thence north parallel with the said north and south line fifty (50) feet to the place of beginning, and that he is acquainted with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of said land in question, as well as the value of said described tract and that said tract of land is of the market value and is reasonably worth at least six thousand dollars ($6000.00) and that the
11 value of said tract of land exceeds five thousand dollars ($5000.00) and that the amount in controversy between the parties hereto, exclusive of costs and interest, is more than five thousand dollars ($5000.00).

J. L. WILKIN.

Subscribed in my presence and sworn to before me this 6th day of October A. D. 1903.

GEO. L. COOK,
[SEAL.] *Notary Public.*

My com. expires Dec. 2, 1903.

Endorsed: 1126—City of Oklahoma City *vs.* Frank McMaster—Affidavit of J. L. Wilkin as to amount in controversy—Filed Oct. 10, 1903—Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

12 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error, *vs.* FRANK MCMASTER, Defendant in Error.	Assignments of Error in the Supreme Court of the United States on Error and Appeal of the December Term, in the Year of Our Lord One Thousand Nine Hundred and Three.

Afterwards, to-wit: upon the first Monday of December, in this same term before the justice- of the Supreme Court of the United States at the Capitol in the city of Washington, comes the said City of Oklahoma City, by Frank Dale and A. G. C. Bierer and S. A. McGinnis, and C. Porter Johnson, its attorneys, and says, that in the record and proceedings aforesaid there is manifest error in this, to-wit:

1st. That the said supreme court of the Territory of Oklahoma erred in affirming the judgment rendered in said cause in the district court of Oklahoma county, Oklahoma Territory.

2nd. That the supreme court of the Territory of Oklahoma erred in affirming the judgment of the district court of Oklahoma county in overruling the motion of plaintiff in error for a new trial therein.

3rd. The supreme court of the Territory of Oklahoma erred in affirming the judgment of the district court of Oklahoma county in overruling the demurrer filed by the plaintiff in error to the petition of said defendant in error.

4th. The supreme court of the Territory of Oklahoma erred in affirming the judgment of the trial court of Oklahoma county in sustaining the motion to vacate the order of the trial court in sustaining the demand of plaintiff in error in the trial court for a second trial of said cause and setting aside the judgment rendered therein and granting a second trial to plaintiff in error had in the trial court.

5th. That the supreme court of the Territory of Oklahoma erred in affirming the judgment of the trial court in reinstating
13 the judgment against the plaintiff in error upon the motion of defendant in error, after said judgment had been by its own

terms and provisions set aside and vacated and a second trial of said action awarded as provided in said judgment.

6th. That said supreme court of the Territory of Oklahoma erred in affirming the judgment and rulings of the trial court in admitting in evidence against this plaintiff in error and over its objection at the trial of said cause a copy of certain findings made by the district court of the second judicial district of Canadian county, Oklahoma Territory, in an action in which Frank McMaster was plaintiff and Edgar N. Sweet, Levi E. Coe, and David H. Hammond, constituting the trustees of board No. 2, of the townsite trustees and which findings are as follows, to-wit:

In the District Court, 2nd Judicial District, County of Canadian, Territory of Oklahoma.

FRANK MCMASTER
vs.
TOWNSITE TRUSTEES.

FRANK MCMASTER, Plaintiff,
vs.
EDGAR N. SWEET, LEVI E. COE, DAVID H. HAMMONS, Defendants.

This case coming on to be heard before the Hon. J. H. Burford, judge of said court on the pleadings and evidence herein, the court finds that the defendants were trustees of the townsite of Oklahoma City in said county for the benefit of the actual occupants thereof under the act of Congress approved May 14th, 1890.

That on the 3rd of September 1890 said trustees entered at the land office of the United States at Oklahoma City, O. T., the S. E. ¼ sec. 33 twp. N. 12 range 3 west of the Indian meridian in trust for the use and benefit of the occupants thereof and that a patent has been issued to said trustees for said land to be conveyed by them to the occupants thereof as their several interests should appear at the date of said entry.

That said tract of land was on the 22nd day of April, 1889, open to settlement under the act of Congress approved March 2nd, 1889, and that such tract of land was settled upon and occupied as a townsite shortly after noon of said day and has continued to be and is now held and occupied.

That a portion of the occupants of said tract on said 22nd day of April 1889 agreed tacitly to the plat of said tract of land conveying lots, blocks, streets and alleys and that the plaintiff herein on said day lagally entered upon and occupied and has since continued to claim the piece or parcel of ground particularly described in the complaint as his lots.

That said piece or parcel of ground at that time was lots 1 and 2 in block 24 according to the plat so agreed upon. That the Ex-

hibit "A" attached to the complaint is a correct copy of
14 said plat.

That subsequently to such occupancy and prior to the conveyance to said trustees a different plat and arrangement of the streets, lots, blocks and alleys was adopted and enforced by the parties occupying the said townsite.

That by such plat the parcel of land claimed by the plaintiff was thrown into the street called Grand avenue. That plaintiff did not consent but objected to said second plat and has never consented thereto or acquiesced.

That said tract of land is described as follows, according to the said last named plat, commencing at a point on the S. E. corner of block 23 according to the present plat and running southerly on a line with the west line of Broadway, thirty three and 10/100 feet from said southeast corner of said block 23, thence west from said west line of Broadway 140 feet, thence south 50 feet, thence east 140 feet and thence north 50 feet to the place of beginning.

That thereafter he was by parties recognized, by said authorities forcible removed from said parcel of ground and has since that time been forcibly kept from the occupancy of said tract.

That on the 21st day of April, 1891, this plaintiff applied to said defendants as such trustees for deed to said lot but said trustees found the facts substantially as above stated but declined to award him a deed for said lot or any part thereof.

That said city of Oklahoma City has appropriated said lots to *his* own purpose as a street and so appropriated the same long prior to the conveyance of said tract by the United States to said trustees.

That C. G. Jones, A. C. Scott and Moses Neal are the successors in said trust of said defendants.

That said plaintiff was not an occupant of said tract of ground at the time the United States conveyed the same to the defendants as trustees but said portion of said tract was at the time used and occupied as street by said city.

JOHN H. BURFORD, *Judge.*

TERRITORY OF OKLAHOMA, }
Canadian County, } *ss:*

I, Benj. F. Hegler, clerk district court in and for the county and Territory aforesaid do hereby certify that the above and foregoing is a full and correct copy of an order and decree of the court in the above entitled case as the same appears of record on Order Book 1, page 427 in my office.

Witness my hand and seal of said court hereto affixed at my office in El Reno this 11th day of May 1892.

BENJ. F. HEGLER,
Clerk Dist. Court,
By E. R. FISCHER, *Deputy.*

TERRITORY OF OKLAHOMA, }
County of Oklahoma. }

This instrument filed for record on this 14th day of May 1892, at 1:30 o'clock p. m.

R. H. MANSUR,
Register of Deeds.""

15 7th. That the said supreme court of the Territory of Oklahoma erred in affirming the judgment and order of the trial court in said action in admitting in evidence against this plaintiff in error and over its objections a copy of a certain order or judgment rendered and entered in said cause of Frank McMaster, plaintiff, *vs.* Edgar N. Sweet, Levi E. Coe, and David H. Hammons, townsite, trustees board No. 2, and their successors, defendants, and which order is as follows, to-wit:

"In the District Court, Canadian County, Second Judicial District, Oklahoma Territory.

FRANK MCMASTER
vs.
EDGAR M. SWEET, LEVI E. COE, and DAVID H. HAMMONS, Townsite Trustees, Board No. 2, and Their Successors.

On motion in this cause, on the 13th day of October, 1893, being one of the regular days of said court at Kingfisher in Kingfisher county in open court, the same being then in session, the following proceedings were had: It is ordered herein that said defendants make, execute and deliver to Frank McMaster, plaintiff herein, a trustees' deed as decreed by this court on the 14th day of November 1892 of the following described premises and real estate, to-wit: Commencing at a point on the southeast corner of block (23) twenty three as shown by the trustees' plat of Oklahoma City, O. T. running thence southerly on a straight line with the west line of Broadway as shown by said trustees' plat thirty three and ten one hundredths (33 10/100) from said southeast corner of the block aforesaid to the place of beginning; thence west one hundred and forty feet (140) thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with the aforesaid east and west street line one hundred and forty feet (140); thence north to the place of beginning fifty feet (50). Provided, however, that the said plaintiff, shall fully — all costs of said trustees in the making of the deed herein ordered.

In witness whereof I have hereunto set my hand and caused the seal of said court to be affixed this the thirteenth day of October, 1893.

JOHN H. BURFORD, *Judge.*

TERRITORY OF OKLAHOMA, } ss:
County of Kingfisher, }

I, Benj. F. Hegler, clerk of the district court of the 2nd judicial district *and* in and for said county and Territory hereby certify that the within and foregoing is a full true and complete copy of the order this day made in the above entitled cases as the same appears on file and of record in my office.

16 In witness whereof I hereto set my hand and the seal of said county at Kingfisher this 13" October, 1893.

[SEAL.] BENJ. F. HEGLER,
Clerk of Second Dist., O. T."

8th. That said supreme court erred in affirming the judgment of the trial court in admitting evidence on the trial of said cause on the part of the defendant in error and over the objections and exceptions of plaintiff in error.

9th. That the said supreme court erred in affirming the judgment of the trial court in rendering the judgment in said cause against this plaintiff in error and in favor of the defendant in error.

10th. That said supreme court erred in affirming the judgment of the trial court in not rendering judgment in said cause for plaintiff in error on the evidence introduced on the trial of said cause.

11th. That said supreme court of the Territory of Oklahoma erred in holding and deciding as a matter of law in this case that where a claim is entered upon public lands which are opened to settlement and a party has made settlement thereon for homestead purposes and has legal rights therein, such rights can not be taken from him for public use, except by due process of law and the payment of just and reasonable compensation therefor in this that said principle of law is not applicable to this case because the defendant in error did not claim any rights to the property by virtue of settlement made under the homestead law of the United States, but claimed a right thereto as a townsite occupant and said supreme court erred in holding and deciding that the defendant in error had a vested right in and to the land in controversy under the facts of this cause.

12th. That said supreme court of the Territory of Oklahoma erred in holding that the townsite trustees of said board of trus-

17 tees No. 2, assigned to townsites in Oklahoma, were such to satisfy a land or law claimant, prior to the time that said trustees had the title conveyed in them for a trust purpose and that any subsequent grantee of the townsite trustees would be bound by such judgment rendered against said townsite trustees.

13th. That said supreme court of the Territory of Oklahoma erred in holding as a matter of law that the finding of facts made by the district court of Canadian county in an action by said defendant in error, Frank McMaster against said Board of Townsite Trustees,

Board No. 2, composed of Edgar N. Sweet, Levi E. Coe, and David H. Hammonds, constituted a judgment and a final conclusion of said district court of Canadian county and that said findings were competent evidence in this cause in the trial court.

14th. That the said supreme court of the Territory of Oklahoma erred in holding as a matter of law that the plat made by said board No. 2, of the townsite trustees platting the land patented to said trustees for townsite purposes into lots, blocks, streets and alleys, did not legally vest the title to the streets so platted for public purposes and in holding that the property of the plaintiff in the trial court and which was located in a street so platted was taken from the defendant in error without due process of law.

15th. That said supreme court of the Territory of Oklahoma erred as a matter of law in holding and deciding that the defendant in error Frank McMaster plaintiff in the trial court had a vested interest in the land in controversy and which was composed of parcels of land which was located in a street in Oklahoma City, as
18 shown and declared by the plat approved by the said board of townsite trustees, constituted and appointed under act of Congress in May 14th, 1890, governing townsites in Oklahoma Territory.

16th. That said supreme court of the Territory of Oklahoma erred in not holding as a matter of law that when the board of townsite trustees constituted and appointed under the act of Congress May 14th, 1890, governing townsites in Oklahoma Territory, that all of the lands so located in the streets as shown by the plat approved by said trustees was vested in the public for the public use and devoted to public use as a public street and highway.

19 17th. That said supreme court of the Territory of Oklahoma erred in holding as a matter of law that defendant in error, plaintiff in the trial court, had a vested interest in the land in controversy called lots, but which it appears was located in a street in the townsite of Oklahoma City when the said land was platted by the trustees of said townsite and the plat approved by said trustees and in holding that a vested interest could be obtained in and to a part of said townsite which, when the same was platted by said trustees, was shown to be in a street of said townsite.

18th. That the said supreme court of the Territory of Oklahoma erred in holding as a matter of law that a person who was not in possession of part of said townsite at the time the same was patented to the townsite trustees in trust for the use and benefit of the occupants thereof for public purposes, including the location of streets and alleys had or could have a vested interest in said townsite and, particularly in a part of said townsite which had been by the occupants of said townsite prior to the patent thereof for the use and benefit of the occupants and public purposes, devoted to the public for use as a street.

19th. That the said supreme court of the Territory of Oklahoma erred in rendering a judgment against the plaintiff in error and in decreeing that it unlawfully and wrongfully withheld the title and possession of the tract of land in controversy from the defendant in error; whereas the said municipal corporation had not been vested with the fee to said street, so as to enable the plaintiff in the trial court to maintain an action against it for the title thereto.

20th. That the value of the land and the matter in controversy in this action exceeds five thousand dollars ($5000.00) as appears by affidavits presented in the records of this cause.

21st. That the said supreme court of the Territory of Oklahoma erred in holding and deciding as a matter of law that the plaintiff in error, here plaintiff in error in the supreme court of the Territory of Oklahoma had waived and abandoned the assignments of error made by this plaintiff in error in said supreme court of Oklahoma and which are embraced within "the first and second assignments of error as herein set forth," as stated in the opinion of the supreme court of Oklahoma and in holding and deciding that the plaintiff in error had abandoned the following assignments of error as contained in the petition in error in this cause in the supreme court of Oklahoma Territory, to-wit:

First. Overruling the demurrer of defendant to plaintiff's petition.

Second. Error of the court in setting aside the order of the court made granting a new trial to the defendant as a matter of course without showing cause entered in the journal and in re-instating the judgment in favor of the plaintiff; and

Third. Error of the court in rendering judgment in favor of the plaintiff instead of the defendant.

22nd. That the supreme court of the Territory of Oklahoma erred in holding that the plaintiff in error had waived and abandoned its assignment of error upon the record of the trial court in overruling the demurrer of the defendant to plaintiff's petition.

23rd. That the supreme court of the Territory of Oklahoma erred in holding and deciding in its opinion that the plaintiff in error had abandoned its assignment of error in that the trial court erred in setting aside the order of the court made granting a new trial to the defendant as a matter of course without showing cause entered in the journal and in re-instating the judgment in favor of the plaintiff in the trial court.

Wherefore the plaintiff in error prays that the judgment of the supreme court of the Territory of Oklahoma herein may be reversed, annulled and held for naught and that the plaintiff in error may be restored to all things which it has lost by occasion of said judgment, and that the errors of the supreme court of the Territory of Okla-

homa be fully corrected and that judgment be entered dismissing the cause of action of defendant in error.

S. A. McGINNIS,
City Attorney in and for Oklahoma City, O. T.
FRANK DALE,
A. G. C. BIERER, AND
C. PORTER JOHNSON,
Attorneys for Plaintiff in Error.

Endorsed: 1126. The City of Oklahoma City, *vs.* Frank McMaster. Assignment of error. Filed Oct. 10, 1903, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

20½ In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } Order.

Now on this tenth day of October, A. D. 1903, comes the plaintiff in error by its attorneys Frank Dale and A. G. C. Bierer, and files herein and presents to the court its petition and assignments of error praying an allowance of a writ of error, and that the transcript of the record and proceedings duly authenticated may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as may be proper in the premises.

Upon proper consideration whereof, the court and the undersigned chief justice thereof, does allow the writ of error and appeal and directs and commands the clerk of this court to transmit to the said Supreme Court of the United States a true and certified transcript of the record and all papers, files and proceedings herein.

It is further ordered that the plaintiff in error shall give bond in the sum of three thousand dollars ($3000.00) to be approved by the clerk of this court within twenty (20) days from this date and upon so doing these proceedings in error and appeal and the said bond shall operate as a supersedeas as a stay of all proceedings herein in the supreme court of the Territory of Oklahoma and in the district court of Oklahoma county, pending said cause in the Supreme Court of the United States.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest: BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: 1126—The City of Oklahoma City *versus* Frank McMaster—Order allowing writ of error—Filed Oct. 10, 1903, Benj. F. Hegler, clerk supreme court.

21 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error, *vs.* FRANK MCMASTER, Defendant in Error.	Writ of Error to the Supreme Court of the Territory of Oklahoma.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said court before you, in which the value of the land and the matter in controversy exceeds five thousand dollars ($5000.00) and wherein it appears that the land and the possession thereof is involved, a manifest error hath happened to the great damage of the said City of Oklahoma City as by its complaint and assignment of error appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, command you, if judgment therein be given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States with this writ so that you, have the same at Washington on the ninth day of November next, in the said Supreme Court to be then and there held.

That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States and of said Territory should be done.

It is further ordered and commanded that mandate and execution of said judgment of the supreme court of the Territory of Oklahoma be stayed until a final determination of this cause upon condition that the said plaintiff in error enter into a good and sufficient undertaking to the defendant in error in the sum of three thousand dollars, conditioned as required by law within twenty (20) days.

Witness the Honorable John H. Burford, chief justice of
22 the supreme court of the Territory of Oklahoma this tenth day of October, in the year of our Lord one thousand nine hundred and three.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Allowed:
By JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Filed October tenth, A. D. 1903.
BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory.

[Endorsed:] 1126 The City of Oklahoma City *versus* Frank McMaster. Writ of error. Filed Oct. 10 1903. Benj. F. Hegler, clerk supreme court. By —— —— deputy.

23 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } Bond on Appeal.

Know all men by these presents, that we, The City of Oklahoma City as principal, and Seymour C. Heyman and C. B. Ames as sureties, are held and firmly bound unto Frank McMaster in the full and just sum of three thousand ($3000.00) dollars, to be paid to the said Frank McMaster, his certain attorney, administrator or assigns, to which payment well and truly to be paid, we bind ourselves, our executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of October, A. D. 1903.

Whereas, lately at a term of the supreme court of Oklahoma in a suit pending in said court, wherein The City of Oklahoma City is plaintiff in error and Frank McMaster is defendant in error, judgment was rendered in said court on the sixth day of June A. D. 1903, in favor of said defendant in error and against the said plaintiff in error and the said plaintiff in error having obtained a writ of error from the Supreme Court of the United States for the reversal of said judgment and an order of the supreme court of the Territory of Oklahoma staying mandate and execution of said judgment upon the giving by plaintiff in error of a good and sufficient bond in the sum of three thousand dollars, and citation having been issued upon said writ of error, and served upon Frank McMaster, defendant in error, citing and admonishing the said defendant in error to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next.

24 Now, the condition of the above obligation is such that if said City of Oklahoma City shall prosecute its said writ of error to effect and answer all damages and costs, if it fail to make its — appear good, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands this 14th day of October A. D. 1903.

THE CITY OF OKLAHOMA CITY,
By LEE VAN WINKLE, *Mayor.*
T. A. BLAISE, *City Clerk.*

[SEAL.]

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I hereby approve the within bond and sureties thereto this 14 day of October, 1903.

BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory.

SEYMOUR C. HEYMAN AND
C. B. AMES, *Sureties.*

TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

Seymour C. Heyman and C. B. Ames being duly sworn, each for himself says:

That he is worth the sum of five thousand dollars ($5000.00) over and above all just debts, liabilities and exemptions.

SEYMOUR C. HEYMAN.
C. B. AMES.

Subscribed and sworn to before me this 14th day of October, 1903.

[SEAL.] N. E. DE MOSS,
Notary Public.

My commission expires 10 of September, 1903.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Bond on appeal—The within bond approved by me this Oct. 14, 1903. Benj. F. Hegler, clerk supreme court—Filed Oct. 15, 1903—Benj. F. Hegler, clerk supreme court.

25 The supreme court of this Territory having affirmed the judgment in the case of McMasters *vs.* Oklahoma City, and the mayor and city attorney, being the special committee to whom the question of the future disposition of said cause was referred having recommended that said cause be appealed to the Supreme Court of the United States; and the council concurring in said recommendation; therefore be it resolved by the city council of Oklahoma City, that the employment of Messrs. Dale & Bierer and C. Porter Johnson, to assist the city attorney in prosecuting said appeal, be and the same is hereby approved and the mayor and city clerk are hereby authorized to sign all bonds or other papers necessary to perfect said appeal, and that the mayor and city attorney be hereby authorized to do and perform any and all other acts found necessary to carry into effect the object and purposes of these resolutions.

Approved Oct. 13, 1903.

LEE VAN WINKLE, *Mayor.*

Attest:
[SEAL.] T. A. BLAISE, *City Clerk.*

I hereby certify that the above and foregoing is a true correct and complete copy of a resolution adopted by the city council of the city of Oklahoma City, O. T., in regular session assembled on the 12th day of October, 1903, as the same appears of record on file in my office.

[SEAL.]

T. A. BLAISE,
City Clerk of said City.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Approving employment of counsel—Filed Oct. 15, 1903,—Benj. F. Hegler, clerk supreme court.

26 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error, *vs.* FRANK MCMASTER, Defendant in Error.	No. 1126. Petition in Error.

The said plaintiff in error, The City of Oklahoma City, a municipal corporation and city of the first class, of Oklahoma Territory, situated in Oklahoma county in said Territory, complains of the said Frank McMaster, defendant in error, for that the said defendant in error at the regular February, 1900, term of the district court of the third judicial district of the Territory of Oklahoma, sitting within and for the county of Oklahoma, recovered a judgment in said county against the said plaintiff in error in a certain action then pending in said court, wherein the said Frank McMaster was plaintiff and The City of Oklahoma City aforesaid was defendant.

The original case made in this cause duly certified and attested is hereunto attached, marked Exhibit "A" and made a part of this petition in error, and the said plaintiff in error, The City of Oklahoma City aforesaid, has appealed and does hereby appeal from the said judgment to the supreme court of the Territory of Oklahoma, and alleges, avers and states that there is error in said record and proceedings in this to-wit:

First. The said district court erred in overruling the motion of the plaintiff in error for a new trial.

27 Second. The said district court erred in not sustaining the demurrer filed by the plaintiff in error to the petition of said defendant in error.

Third. The said district court erred in reinstating the judgment against said plaintiff in error upon the motion of said defendant in error after said judgment had been by its own terms and provisions set aside and vacated and a second trial of said action awarded as provided in said judgment.

Fourth. The said district court erred in admitting in evidence against said plaintiff in error, and over its objection on the trial of

said cause, the copy of a certain pretended judgment of the district court of Canadian county purporting to have been rendered in an action in said last named court in said Canadian county district court, in which said defendant in error was plaintiff and "Townsite Trustees," Edgar N. Sweet, Levi E. Coe and David H. Hammons were defendants.

Fifth. Said district court erred in the trial of said action in admitting in evidence against said plaintiff in error and its objections, the copy of a certain order or judgment purporting to be a judgment or order of the district court of Canadian county made at Kingfisher county on the 13th day of October, 1893, in an action in which said defendant in error was plaintiff and Edgar N. Sweet, Levi E. Coe and David H. Hammons, townsite trustees, board No. 2 and their suc-essors were defendants.

Sixth. The said district court erred in admitting evidence in the trial of said cause on the part of said defendant in error.

Seventh. The said district court erred in not rendering judgment in said cause for the said plaintiff in error on the evidence
28 introduced on the trial of said action.

Eighth. The said district court erred in rendering judgment in said action against said plaintiff in error and in favor of said defendant in error.

Wherefore plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be ordered to be rendered in favor of the plaintiff in error and against the defendant in error upon the facts as disclosed by the record of case-made; and that the plaintiff in error be restored to all of the rights that said plaintiff in error may have lost by the rendition of the said judgment herein, and for such other and further relief as to the court may seem just and proper.

THE CITY OF OKLAHOMA CITY,
Plaintiff in Error,
By JNO. H. WRIGHT,
City Attorney of the City of Okla., and
DOUGLAS AND DOUGLAS,
Attorneys for Plaintiff in Error.

Filed Aug. 5 1901,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

29 EXHIBIT "A."

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahoma County.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Case Made.

Be it remembered that on the 22nd day of Sept. 1899, the above named plaintiff commenced his action against the above named defendant by filing in said district court on that date, his petition, which is in words and figures following to-wit:

30 TERRITORY OF OKLAHOMA, }
Oklahoma County. }

In the District Court, 3rd District.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Petition.

Now comes the plaintiff herein complaining and says:

1st. That the defendant is a municipal corporation of Oklahoma Territory, being a city of the first class and located in Oklahoma county aforesaid.

2nd. That the plaintiff is the legal and equitable owner of the real estate herein described and fully entitled to the possession thereof and of which the defendant unlawfully keeps him out of the possession, being a part of the southeast quarter (¼) section thirty three (33), town 12 north, range 3 west in said county and Territory more particularly described as follows: Commencing at a point in said city on the southeast corner of block twenty three (23) as shown by the trustees' plat, being the plat now in use of said city and running thence southerly on a straight line with the west line of Broadway street as shown by said plat thirty three and ten one hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning: thence west from said place of beginning one hundred and forty (140) feet, thence south at a right angle with the line aforesaid fifty (50) feet, thence east parallel with said east and west line first named one hundred and forty (140) feet, thence north parallel with said north and south line fifty (50) feet to the place of beginning.

3rd. That prior to the filing hereof being far more than
31 four weeks thereto plaintiff presented his claim to defendant for uses, rents, and profits thereon, as well as a demand for possession of said real estate described as aforesaid but that defendant refused to pay said claim and still retains possession of said real estate to the damage of plaintiff in the sum of two hundred and fifty ($250) dollars per year since the 14th day of November 1892.

4th. Said real estate is further described on the "Dick" plat, being the original plat of said city as lots No. one (1), two (2) of block No. twenty four (24) of said plant as filed in the U. S. Land Office.

Wherefore plaintiff prays judgment herein against defendant.

1st. For the recovery of said real estate, and damages for withholding possession thereof.

2nd. For other and further relief.

FRANK McMASTER, *Plaintiff.*

H. H. HOWARD, *Attorney.*

No. 2053. Frank McMaster *vs.* Oklahoma City. Amended petition. Filed Sept. 22, 1899, B. D. Shear, clerk. H. H. Howard, att'y

32 And thereafter on the 10th day of October, 1899, the defendant herein filed its demurrer to plaintiff's petition filed herein on the 22nd day of Sept. 1899, in said cause, which demurrer is as follows to-wit:

33 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court.

FRANK McMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Demurrer.

Comes now the defendant, The City of Oklahoma City and demurs to the petition of the plaintiff filed on the 22nd day of September 1899, and for cause and grounds of said demurrer says:

That said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against said defendant.

THE CITY OF OKLAHOMA CITY, *Defendant,*
By JOHN H. WRIGHT AND
DOUGLAS AND DOUGLAS, *Its Attorneys.*

2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Demurrer. Filed in district court, Oklahoma county, O. T., October 10, 1899. B. D. Shear, clerk, by M. McKinley, deputy. Refiled by leave of court Nov. 20, 1899. D. B. Shear, clerk.

34 And thereafter on the 20th day of Nov. 1899, the following proceedings were had in said cause, to-wit:

35 FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Case No. 2053.

This cause came on to be heard by the court on demurrer of defendant to plaintiff's petition, and on consideration thereof, the same is by the court overruled, to which ruling the defendant excepted.

36 And thereafter on the 24th day of Nov. 1899, the defendant filed its answer in said cause herein, which is in words and figures as follows, to-wit:

37 TERRITORY OF OKLAHOMA, } *ss:*
County of Oklahoma, }

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Answer.

1. Now comes the said defendant, The City of Oklahoma City, and for answer to the petition of said plaintiff filed in said cause on the 22nd day of September, 1899, denies each and every allegation and averment therein contained except such as are hereinafter expressly admitted.

The said defendant admits that it is a municipal corporation and city of the first class as alleged in said plaintiff's petition.

2. The defendant further answering says that the tract and parcel of land claimed by said plaintiff and described in said plaintiff's said petition is a part of the original townsite of the city of Oklahoma City in the Territory of Oklahoma, and is situated in and is included in and is a part of Grand avenue, a public highway and street of said city, as the same appears on the original plat and survey of said city, which said plat and survey was approved by board No. 2, of townsite trustees of Oklahoma City on the 6th day of September, 1890, and recorded under and by the direction of said board in the office of the register of deeds of Oklahoma county, Territory of Oklahoma, on the 8th day of September, 1890, in Book No. *one* of plats of the records of said county at pages *2, 3 & 4* of said book.

That said public highway in said city, to-wit: said Grand avenue, with the said land claimed by plaintiff, included therein, was and had been for more than one year prior to the approval of said plat and survey by said board No. 2 of townsite trustees and *and*
38 the filing of said plat so approved in the office of the register of deeds of said Oklahoma county as aforesaid, and has been

at all times since, used and occupied exclusively as a public highway and street of said city by the inhabitants of said city and Territory at all times, and was so exclusively used as a public highway and street long before the organization of said city as a municipal corporation, and that said plaintiff was not during any time is possession of said parcel of land now claimed by him and had no interest therein.

Wherefore, defendant prays judgment for its costs herein against said plaintiff.

THE CITY OF OKLAHOMA CITY, *Plaintiff*,
By JNO. H. WRIGHT, *City Attorney, and*
DOUGLAS AND DOUGLAS, *Its Attorneys.*

#2053. Frank McMaster, plaintiff. *vs.* The City of Oklahoma City, defendant. Answer. Filed in district court, Oklahoma county, O. T. Nov. 24, 1899. B. D. Shear, clerk. By M. McKinley, deputy.

39 And thereafter on the 5th day of February 1900, plaintiff filed his reply in said cause which is in words and figures as follows to wit:

40 TERRITORY OF OKLAHOMA, *Oklahoma County,* } *ss:*

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } #2053. Replication.

Now comes plaintiff — for replication to the answer filed herein says:

He denies each and every allegation of said answer and every and all of the averments therein which contradict the averments counts and allegations of the plaintiff's petition filed herein.

Wherefore he the plaintiff prays judgment as asked in said petition.

FRANK McMASTER, *Plaintiff.*

H. H. HOWARD,
Att'y for Plaintiff.

#2053. Frank McMaster, *vs.* Oklahoma City. Replication Filed in district court, Oklahoma county, O. T., Feb. 5th, 1900. B. D. Shear, clerk. By M. McKinley, deputy. H. H. Howard, att'y.

41 And thereafter on the 15th day of February, 1900, the following proceedings were had in said cause, to-wit:

42 TERRITORY OF OKLAHOMA, } *ss*:
County of Oklahoma, }

In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahoma County.

FRANK MCMASTER, Plaintiff,
vs.
CITY OF OKLAHOMA CITY, Defendant.

On this 15th day of February, 1900, at a regular term of the district court of the third judicial district held in and for Oklahoma county in the Territory of Oklahoma, the above entitled case came on for trial before the Hon. B. F. Burwell, presiding judge, and the plaintiff appeared in person and by its attorney- Howard and Ames, and the defendant by the city attorney, John H. Wright and Selwyn Douglas, its attorneys, and thereupon the following proceedings were had in said cause to-wit:

43 Mr. HOWARD: In behalf of the plaintiff, we first offer in evidence, the patent made to the townsite trustees by the Government. I have here simply a certified copy.

Mr. DOUGLAS: We do not object to it on the ground that it is not the original, but we do object to it for the reason that it does not tend to prove any issue in this cause, and is incompetent, irrelevant and immaterial.

Overruled by the court and defendant excepts.

Marked Exhibit "A."

Mr. HOWARD: I now desire to offer in evidence a judgment rendered in the case of McMaster *vs.* The Townsite Trustees by Justice John H. Burford on the 14th day of November, 1892,

To which defendant objects *to* as incompetent, irrelevant and immaterial, and the City of Oklahoma City not being a party to said cause.

By the COURT: Overruled. Let it be marked as an exhibit in the case. You will be given exceptions to all of these offers.

Marked Exhibit "B."

Here the plaintiff also offers in evidence a certificate of the register of deeds upon that judgment, showing that it has been recorded in his office in Oklahoma county wherein the land is situated.

Mr. DOUGLAS: Defendant objects as incompetent, irrelevant and *and* immaterial.

By the COURT: I will let that be marked under the same order.

To which the defendant excepts.

Plaintiff now offers in evidence a further order of the district — by Judge Burford, in the same case, dated October 13th, 1893, together with a certificate of the register of deeds of Oklahoma county, that the same has been recorded in his office.

44 To which defendant objects as incompetent, irrelevant and immaterial.

By the COURT: Let it be marked under the same rule.

To which defendant excepts.

Marked Exhibit "C."

JOHN HOLZAPPEL being called and sworn, testified as a witness in behalf of the plaintiff, as follows:

Q. What is your name?

A. John Holzappel.

Q. Where do you reside?

A. I live in Oklahoma City, Oklahoma county.

Q. How long have you lived here?

A. I have lived here since the 22nd day of April, 1889.

Q. What has been your business?

A. Real-estate and rentals.

Q. Are you acquainted with this property in controversy?

A. Why, is it the street corner?

Q. Yes?

A. Yes, I am acquainted with it.

Q. Do you know its reasonable rental value for that period?

Mr. DOUGLAS: From what time?

Q. Well, for any period?

Mr. D.: Let's have the time. Give some date.

Q. Do you know it for the last year?

A. Now what street are you talking about?

Q. That tract of land; that piece of land. Do you know what the rental value would be worth?

45 A. How large is it?

Q. 50 x 140 ft.

A. Why, I know as near as it could be gotten at, I should think.

Mr. DOUGLAS: I don't understand that the witness knows what property he is talking about.

Q. I understand this to be a piece of ground in the middle of Grand Ave. down here somewhere, part of the street. You say you know the rental value of that, do you?

A. I know about what a piece of ground there 50 x 140 feet would be worth, the rental value of it or thereabouts.

Q. What do you say, Mr. Holzappel, would be the rental value of that piece of ground since November 23, 1892?

To which defendant objects as incompetent, irrelevant and immaterial. Overruled by the court and defendant excepts.

Mr. DOUGLAS: I would like to be heard. I suppose that under the decisions of the court upon our statutes in regard to the recovery of lands in ejectment, and the recovery of rents and profits, they can't go back more than three years before the right of action com-

menced, unless they can show they are claiming under a written lease. I suppose they could not go back of the statute of limitations for the recovery of damages. They are asking for the rental value of it now in 1892; this suit wasn't commenced until 1897, '8 or '9. Now I suppose they couldn't go back of 1895 anyhow.

By the COURT: I think that was within three years prior to the bringing of the suit.

Q. You may state how much per year the rental value of those premises would have been worth, for the past 3, 4, 5, or 6 years?

46 Defendant objects as incompetent, irrelevant and immaterial; the witness hasn't shown himself able to say. Sustained; plaintiff excepts.

Q. Are you able to say what the reasonable rental value of this property would have been from the 3rd day of February, 1895?

A. Well, I would want to know a little more about it,—whether it fronts on a street, fronts on Broadway?

Q. A piece of ground 50 x 140, fronting on Broadway, running 140 feet west?

A. Yes, I would know what the reasonable value would be.

Q. Do you know where this land is situated?

A. Yes.

Q. What would be its value per year to the present from that time?

Defendant objects as incompetent, irrelevant and immaterial.

By the COURT: That confines it to within three years prior to the filing of the petition?

Mr. HOWARD: Yes.

Objection overruled by the court; defendant excepts.

A. I think $250 a year would be a reasonable rental value for that ground.

Cross examination:

Q. Where is that ground, John?

A. It is in Grand avenue, right north of the Batcheldor building.

Q. Is it a part of one of the principal highways of the city?

A. That is the way I understand it, yes, sir.

Q. Now just describe it by metes and bounds?

A. They asked for a piece of ground 50 ft. front by 140 deep, right there.

Q. Which way does it front?

47 A. Fronts east.

Q. Where does it stand; where is it?

A. I couldn't give you the metes and bounds of it. They asked for a piece of ground in that street there.

Q. Where is it to the block immediately south of it and the lots occupied by Gilpin and Frick's hardware store?

A. Well, the ground they spoke of is right immediately in front of Gilpin and Frick's hardware store.

Q. About how far north?

A. It runs up to it, I suppose.

Q. Well, do you know?

A. No, I don't know. I say I don't know the metes and bounds of it. I know where the ground is.

Q. Do you know how far south the line of this land counsel has described to you, that the plaintiff is claiming, how far south the line of that ground is from Gilpin and Frick's hardware store?

A. No, sir.

Q. Do you know how far the north line is from the other corner?

A. No, sir; I have my opinion but I don't know.

Q. You know nothing about it of your own personal knowledge?

A. Well, not about the metes and bounds; I never looked that up.

Q. Don't know how far the north line is from the city corner?

A. No, sir.

Q. Do you know about how far the south line of it is from the Gilpin and Frick block?

A. No, sir.

Q. How do you figure that that piece of land in the street there is worth $250 a year; do you figure that it is worth that to you to drive over?

48 A. No sir, I figure that if a man had that he could either lease the ground to somebody to build on or build on himself and bring him that much.

Q. Build on it there in the middle of Grand avenue?

A. I am not discussing that part of it.

Q. If there was a building put on there, would it shut up Grand avenue at that point?

A. I suppose it would—to some extent, anyway.

Q. How much of the street would it leave there?

A. 100 feet of ground wouldn't leave any street.

Q. It would just block up one of the principal streets of the town,—the streets now occupied?

A. Yes sir.

Q. How long has that street—Grand avenue—been occupied as a street by the city?

The plaintiff objects as immaterial and not proper cross-examination, the plaintiff having put the witness on to ascertain the value of the premises.

Objection sustained by the court and defendant excepts.

Redirect:

Q. Would it make any difference, Mr. Holzappel, about the exact location of this property, as to its value, as long as it fronted on Broadway and extended west on Grand avenue?

A. No, I don't think it would.

Here the plaintiff rests.

Mr. DOUGLAS: We desire to demur to the evidence.

By the COURT: Dictate your demurrer to the stenographer.

Mr. Douglas dictates the following demurrer: In the district court of the third judicial district, in the Territory of Oklahoma sitting
49 within and for Oklahoma county, Frank McMaster plaintiff *vs.* City of Oklahoma City, defendant. Demurrer. Now comes the said defendant, City of Oklahoma City, and demurs to the evidence introduced herein by the plaintiff and for cause and ground for such demurrer says: That no cause of action has been proved by said plaintiff or by the introduction of said evidence.

Mr. HOWARD: There is one thing more we want to introduce, if the court will allow us to reopen the case for that purpose and it is a mere matter of record in this court.

Mr. HOWARD: We desire if the court please in case No. 278 in this court, the case of Frank McMaster *vs.* Edgar N. Sweet, Levi E. Coe and David H. Hammons townsite trustees to introduce the journal and the order made by the court granting a change of venue in said case. I don't know where to find it.

52 Defendant objects as incompetent, irrelevant and immaterial.

By the COURT: I will admit the journal entry under the same order that the other papers in the case were admitted.

Defendant excepts.

Marked Exhibit "D."

Here plaintiff rests.

Here the defendant interposes the demurrer heretofore dictated.

50 And thereafter on the 17th day of Feb. 1900, said defendant filed demurrer to evidence of plaintiff in said cause, which is in words and figures as follows to wit:

51 TERRITORY OF OKLAHOMA, } *ss*:
Oklahoma County, }

In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahomo County.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Demurrer.

Now comes the said defendant, The City of Oklahoma City, and demurs to the evidence introduced herein by the plaintiff, and for cause and ground of said demurrer says that no cause of action has

been proved by said plaintiff or by the introduction of said testimony.

JOHN H. WRIGHT AND
DOUGLAS AND DOUGLAS.
Attorneys for Defendant.

Endorsements: 2053. McMaster *vs.* Oklahoma City. Demurrer to evidence. Filed Feb. 17th, 1900. B. D. Shear, clerk.

52 Here Mr. Howard reads the order for change of venue, found in Journal No. 2, page 407.

The demurrer is by the court overruled and to the ruling the defendant excepts.

Further hearing of this case is now adjourned until February 17th, 1900.

On this February 17, 1900, all the parties to this case being present, the trial continues and proceedings as follows:

C. J. BOWMAN is the first witness called in the behalf of the defendant, and, after being duly sworn, testified as follows:

Q. Your name is C. J. Bowman?
A. Yes.
Q. What office do you hold at present in the county?
A. The office of register of deeds.
Q. Are you in possession of the records of lands and city lots in Oklahoma county?
A. Yes.
Q. Have you with you the book of final receipts, Book 11?
A. Yes.
Q. Turn to page 3; have you there the record of a final receipt of the local land office to the townsite trustees?
53 A. Yes sir.

Mr. DOUGLAS: We offer it in evidence.

There being no objection, the same is admitted and read in evidence.

Marked Exhibit "E."

Q. Have you in your possession there the original townsite plat filed in your office and approved by the board of townsite trustees No. 2?
A. Yes sir.
Q. Is that it?
A. Yes sir.

Mr. DOUGLAS: We offer it in evidence.

Mr. HOWARD: We desire to make objection to the introduction of the plat. 1. It is not a plat of the lands of which it purports to be a plat. 2. It is not certified by anyone in any official capacity, or

undertaking to act as such, particularly the members of the board of townsite trustees. 3. It does not show whether it is a plat adopted by the inhabitants previous to the action of the townsite trustees, or whether it is a plat and survey made by themselves or under their direction. 4. It does not appear to have ever been approved or accepted by the city, village, municipality, or any one for it. 5. It does not appear to have ever been acknowledged or authenticated in the manner required by law to give to the city, or village or municipal government any title to the streets and alleys in the city. 6. The sufficiency and correctness of this plat was especially under consideration before the court in the case of McMasters *vs.* The Townsite Trustees, being the case in which the judgment and pleadings have been introduced in evidence, and
54 it cannot be introduced for the purpose of impeaching that judgment in this hearing. 7. It purports to have been filed before the townsite trustees acquired title to the land described in it. 8. And we offer to prove, as a matter of fact, that instead of being approved by the municipality, it was repudicated and declared fraudulent, and that dissapproval has never been retracted in any manner since, as shown by the records of the city.

The objections are overruled by the court and the plat admitted in evidence.

Marked Exhibit "F"

The plaintiff excepts to the ruling of the court.

Mr. DOUGLAS: I will ask the register if that plat is one of the plats of record in the office of the register of deeds of this county?

A. Yes sir.

Q. And has been in your custody all the time?

A. It has.

Q. From whom did you receive it?

A. From my predecessor, Mr. Owen.

Q. In the register's office?

A. Yes sir.

Q. Mr. Owen was the former register of deeds of this county?

A. Yes.

Cross examination:

Q. Mr. Bowman, are there any other plats of the same land in the office?

A. I think there are, Mr. Howard.

Q. You think there are?

A. Yes sir, one more. This is the amended plat I have. There is another one.

55 Q. I wish you would go down and bring it up, Mr. Bowman.

Mr. DOUGLAS: We will offer in evidence the entries of the county commissioners' proceedings in Book 1, at page 11, 12 and 13.

Mr. HOWARD: We object to its introduction, for the reason that it does not show on the face of it that the number of inhabitants within the boundaries there affixed were such as were authorized to be incorporated in a village at that time, and we now offer to prove, as a matter of fact, that the population instead of being not to exceed 1500, as the law requires, was 8 to 10 thousand, and for the further reason that the petition upon which the order is made is not produced; and it will also show that the board at the time was without authority to make the order.

Mr. DOUGLAS: Swear Richard Caffrey.

Mr. HOWARD: We will agree that he is the county clerk and has a part of the county records and that he is the custodian of them, if that is all you want.

Here counsel reads in evidence the entries heretofore offered marked Exhibit "G."

By the COURT: I will admit this, and if you show it is incompetent, I will strike it out, and give you an exception.

Here the defendant rests.

Rebuttal.

Mr. HOWARD: If the court please, we desire to introduce the minutes of the first meeting of the board of trustees appointed by the resolution of the board of county commissioners, which has just been introduced in evidence.

By the COURT: Let it be marked:

56 (Found on Rec. 1, page 1, of city record, entitled "Organization") marked Exhibit "H."

Mr. HOWARD: We have here a well known standard publication known as Bunkey's First Eight Months of Oklahoma City. We desire to offer the tabulated population of the city, on page 25, and show that prior to that time it had a population of some 6000.

Objected to as incompetent and objection sustained.

SIDNEY CLARKE being called and sworn in rebuttal, testified as follows:

Q. State your name.

A. Sidney Clark.

Q. Mr. Clark, were you a resident or inhabitant of Oklahoma City in July, 1890?

A. I was.

Q. Were you acquainted generally with the condition of affairs and the inhabitants of the northeast quarter of section 4, known as south Oklahoma, and the southeast quarter of section 33, and the south half of the northeast quarter of section 33, known as north Oklahoma, at that time?

A. I had a general knowledge of the situation here.

Q. You may state whether this ground was generally covered with buildings and places of habitation?

Defendant objects as incompetent, irrelevant and immaterial.

Q. I will ask you Mr. Clark whether you are prepared to state approximately what the population of these lands mentioned were during the month of July, 1890.

Defendant objects as incompetent, irrelevant and immaterial; and not the best evidence.

Objection sustained; plaintiff excepts.

57 Q. I will get you to state, Mr. Clark, whether you are prepared to say that on the 15th day of July, 1890, the inhabitants of this city were greatly in excess of 1500.

Defendant objects as incompetent, irrelevant and immaterial; does not tend to prove any fact that is competent to contradict that record; not the best evidence.

By the COURT: I think I will exclude that. If, upon an investigation of the authorities, I conclude that you are entitled to prove it, I will open it up for that purpose.

Plaintiff excepts.

Q. I will ask you Mr. Clark, as a matter of fact, if during the entire month of July, 1890, there was not within the limits mentioned inhabitants that would number at least 6 to 8 thousand, and if that fact was not known to everybody?

Defendant objects as incompetent and not the best evidence.

Sustained by the court and plaintiff excepts.

Mr. HOWARD: We offer in evidence the petition upon which the organization of the village of Oklahoma City was made, as shown by the record that has been offered.

Defendant objects, as there is nothing to show in the petition that it is a petition; it has no filing mark at all; nothing to show that it has ever been recorded; that it does not tend to prove any fact against the defendant and is incompetent, irrelevant and immaterial.

By the COURT: There does not seem to be any date or filing mark or any thing else on it. I expect under that objection it will have to be excluded at this time.

Plaintiff excepts.

58 R. F. CAFFREY being called and sworn, testified as follows in rebuttal:

Q. What is your name?
A. Richard F. Caffrey.
Q. What office, if any, do you hold in this county?
A. County clerk.

Q. As county clerk, do you have custody of the county records?
A. Yes.
Q. Do you recognize this instrument?
A. Yes.
Q. Where did you find it?
A. Among the old files in the office.
Q. You have made special search have you for the petition upon which this order incorporating the village of Oklahoma City is based?
A. Yes, sir.
Q. Is there any other petition down there purporting to be such a petition except that?
A. I will state that I don't know: I thought I had found what I was after when I found this.
Q. You don't know of the existence of anything else?
A. I don't know of anything else.

Mr. HOWARD: We desire to offer this again.
To which the defendant makes the same objection as above.
By the COURT: There are parties in town who will know whether that is the petition.
Mr. DOUGLAS: We will not trouble you to send after witnesses. We will admit that this is the petition upon which the order was based.

Mr. HOWARD: Now I wish to read the court the petition.
59 There were a large number of the petitions but I will read only one of them.
Here Mr. Howard reads the court the petition.
Marked Exhibit "I."
After the reading of which, plaintiff and defendant rest and the testimony is closed and the above and foregoing is all the testimony and evidence introduced by the parties, plaintiff and defendant.

60 "Ex. A."

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

Benjamin Harrison
to
Sweet, Edgar N.; Hammons, David H.; Coe, Levi E.

This instrument filed for record on this 10th day of October, A. D. 1890 and duly recorded in Book 1 page 58 of miscellaneous record.

JOHN M. MARTIN,
County Clerk.

Certificate No. 2.

United States of America to all — whom these presents shall come, Greeting:

Whereas Edgar N. Sweet, Levy C. Coe and David H. Hammons, trustees of the townsite of Oklahoma City in the second county in Oklahoma Territory in trust for the several uses and benefit of the occupants of the townsite of Oklahoma City in said county and Territory according to their respective interests have deposited in the *General Land Office of the United States* a certificate of the register of the land office at Oklahoma City, Oklahoma Territory, whereby it appears that full payment has been made by the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, trustees as aforesaid in trust as aforesaid, according to the provisions of the act of Congress of the 24th of April, 1820 entitled An act making further provision for the sale of public lands" and the acts supplemental thereto including the act of May 14th 1890 for the southeast quarter of section 33 thirty three in township twelve north of range three west of Indian meridian in Oklahoma Territory containing one hundred and sixty acres according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general which said tract has been purchased by the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, trus-
61 tees as aforesaid.

Now know ye that the United States of America in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided have given and granted and by these presents do give and grant unto said Edgar N. Sweet, Levy E. Coe and David H. Hammons, trustees as aforesaid in trust as aforesaid and to their successors. The said tract above described to have and to hold the same together with all the rights, privileges, immunities and appurt-ances of whatsoever nature thereunto belonging unto the said Edgar N. Sweet, Levy E. Coe and David H. Hammons trustees as aforesaid in trust as aforesaid and their successors and assigns in trust as aforesaid.

In testimony whereof I, Benjamin Harrison, President of the United States of America have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the first day of October in the year of our Lord one thousand eight hundred and ninety and the Independence of the United States the one hundred and fifteenth.

By the President,

BENJAMIN HARRISON,
By M. McKEAN, *Secretary.*

[SEAL.]

J. W. TOWNSEND,
Recorder of the General Land Office.

Recorded vol. 9 page 383 to 384.

62 EXHIBIT "B."

In the District Court, 2nd Judicial District, County of Canadian, Territory of Oklahoma.

FRANK MCMASTER
vs.
TOWNSITE TRUSTEES.

FRANK MCMASTER, Plaintiff,
vs.
EDGAR N. SWEET, LEVI E. COE, DAVID H. HAMMONS, Defendants.

This case coming on to be heard before the Hon. J. H. Burford, judge of said court on the pleadings and evidence herein, the court finds that the defendants were trustees of the townsite of Oklahoma City in said county for the benefit of the actual occupants thereof under the act of Congress approved May 14th, 1890.

That on the 3rd of September 1890 said trustees entered at the land office of the United States at Oklahoma City, O. T., the S. E. ¼ sec. 33 twp. 12 N. range 3 west of the Indian meridian in trust for the use and benefit of the occupants thereof and that a patent has been issued to said trustees for said land to be conveyed by them to the occupants thereof as their several interests should appear at the date of said entry.

That said tract of land was on the 22nd day of April, 1889 open to settlement under the act of Congress approved March 2nd 1889 and that such tract of land was settled upon and occupied as a townsite shortly after noon of said day and has continued to be and is now held and occupied.

That a portion of the occupants of said tract on said 22nd day of April 1889 agreed tacitly to the plat of said tract of land, conveying lots, blocks, streets and alleys and that the plaintiff herein on said day legally entered upon and occupied and has since continued to claim the piece or parcel of ground particularly described in the complaint as his lots.

63 That said piece or parcel of ground at that time was lots 1 and 2 in block 24 according to the plat so agreed upon.

That the Exhibit A attached to the complaint is a correct copy of said plat.

That subsequently to such occupancy and prior to the conveyance to said trustees a different plat and arrangement of the streets, blocks, lots and alleys was adopted and enforced by the parties occupying the said townsite.

That by such plat the parcel of land claimed by the plaintiff was thrown into the street called Grand avenue. The plaintiff did not consent but objected to said second plat and has never consented thereto or acquiesced.

That said tract of land is described as follows, according to the said last named plat, commencing at a point on the S. E. corner of block 23 according to the present plat and running southerly on a line with the west line of Broadway, thirty-three and 10/1000 feet from said south east corner of said block 23, thence west from said west line of Broadway 140 feet, thence south 50 feet, thence east 140 feet and thence north 50 feet to the place of beginning.

That thereafter he was by parties recognized, by said authorities forcible removed from said parcel of ground and has since that time been forcibly kept from the occupancy of said tract.

That on the 21st day of April, 1891 this plaintiff applied to said defendants as such trustees for deed to said lot but said trustees found the fact substantially as above stated but declined to award him a deed for said lot or any part thereof.

64 That said city of Oklahoma City has appropriated said lots to his own purpose as a street and so appropriated the same long prior to the conveyance of said tract by the United States to said trustees.

That C. G. Jones, A. C. Scott and Moses Neal are the suc-essors in said trust of said defendants.

That said plaintiff was not an occupant of said tract of ground at the time the United States conveyed the same to the defendants as trustees but said portion of said tract was at the time used and occupied as street by said city.

JNO. H. BURFORD, *Judge.*

TERRITORY OF OKLAHOMA, } ss:
Canadian County, }

I, Benj. F. Hegler, clerk district court in and for the county and Territory aforesaid do hereby certify that the above and foregoing is a full and correct copy of an order and decree of the court in the above-entitled case as the sam eappears of record on Order Book 1, page 427, in my office.

Witness my hand and the seal of said court hereto affixed at my office in El Reno this 11th day of May 1892.

BENJ. F. HEGLER,
Clerk District Court,
By E. R. FISCHER, *Deputy.*

TERRITORY OF OKLAHOMA, }
County of Oklahoma. }

This instrument filed for record on this 14th day of May 1892 at 1:30 o'clock p. m.

R. H. MANSUR,
Register of Deeds.

65 EXHIBIT "C."

In the District Court, Canadian County, Second Judicial District, Oklahoma Territory.

FRANK McMASTER
vs.
EDGAR N. SWEET, LEVI E. COE, and DAVID H. HAMMONS, TOWNSITE Trustees, Board No. 2, and Their Successors.

On motion in this case, on the 13th day of October 1893 being one of the regular days of said court at Kingfisher in Kingfisher county in open court, the same being then in session the following proceedings were had:

It is ordered herein that said defendants make, execute and deliver to Frank McMaster, plaintiff herein, a trustees' deed as decreed by this court on the 14th day of November 1892 of the following described premises and real estate to-wit: Commencing at a point on the southeast corner of block (23) twenty-three as shown by the trustees' plat of Oklahoma City O. T. running thence southerly on a straight line with the west line of Broadway as shown by said trustees' plat thirty-three and ten one-hundredths (33.10/100) from said southeast corner of the block aforesaid to the place of beginning, thence west one hundred and forty feet (140) thence south at right angles with the line aforesaid fifty (50) feet, thence east parallel with the aforesaid east and west street line one hundred and forty (140) feet thence north to the place of beginning fifty (50) feet. Provided however that the said plaintiff, shall fully — all costs of said trustees in the making of the deed herein ordered.

66 In witness whereof I have hereunto set my hand and caused the seal of said court to be affixed this 13th day of October, 1893.

JOHN H. BURFORD, *Judge.*

TERRITORY OF OKLAHOMA, } ss:
County of Kingfisher, }

I Benj. F. Hegler, clerk of the district court of the 2nd judicial district *and* in and for said county and Territory, hereby certify that the within and foregoing is a full, true and complete copy of the order this day made in the above entitled cases as the same appears on file and of record in my office.

In witness whereof I hereto set my hand and the seal of said county at Kingfisher this 13 October, 1893.

[SEAL.]

BENJ. F. HEGLER,
Clerk of 2nd Dist., O. T.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

67 EXHIBIT "D."

FRANK McMASTER
vs.
EDGAR N. SWEET ET AL., Trustees. } 278.

Now comes the plaintiff by O. H. Violet, his attorney, and files in open court a motion for change of venue of this cause, and the affidavit having been properly filed as required by the statutes and the court having duly considered said motion and affidavit *and* grants a change of venue to Canadian county, O. T., and the clerk is hereby ordered to forward all the papers on file in this case to the clerk of the district court of said county upon plaintiff's paying all the costs herein accrued.

68 EXHIBIT "E."

No. 2, cash entry, land office at Oklahoma City, sec. 33, town. 12, range 3.

LAND OFFICE AT OKLAHOMA CITY, O. T., *Sept. 3rd*, 1890.

It is hereby certified that in pursuance of law Edgar N. Sweet, Levi E. Coe and David H. Hammons comprising board No. 2 townsite trustees for Oklahoma City in the Territory of Oklahoma on this day purchased of the register of this office for the use and benefit of the inhabitants thereof according to their respective interests the south east quarter (¼) of section 33, township No. 12 north of range 3, west of the Indian meridian, containing 160 acres at the rate of one dollar and 25 cents per acre amounting to two hundred dollars and for which said townsite trustees have made payment in full as required by law. Now therefore be it known that on presentation of this certificate to the Commissioner of the General Land Office the said trustees shall be entitled to receive a patent for the lot above described.

JOHN H. BURFORD, *Register*.

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

This instrument filed for record on the 13th day of Sept. A. D. 1890, and recorded in Book 11, page 3 of final receipts.

(EXHIBIT "F"—MAP.)

(Here follows blue print marked page 68a.)

69 EXHIBIT "G."

JULY 15TH, 1890—9 o'clock a. m.

Board of county commissioners met pursuant to adjournment. All members of the board present.

Written notice signed by A. B. Hammer, county judge, was brought to the board by deputy sheriff, stating that the petition praying for the enjoining of the board of county commissioners from incorporating the N. E. ¼ sec. 4—tp. 11—R. 3 west, in the village of Oklahoma City, had been withdrawn by plaintiff, George E. Thornton and the temporary restraining order, before granted, dissolved by said court.

The matter of incorporating the village of Oklahoma City was then taken up, it being certified in the petition praying for such incorporation that the signatures therein, represented a majority of the taxable inhabitants contained within the limits prayed for; and being satisfied that citizens to the number of 200 or more resided within said limits of each proposed village of Oklahoma City, on motion made, seconded and carried the prayer of said petition was granted and the incorporation of the village of Oklahoma City was ordered within the limits prayed for, and the following trustees appointed residing within said limits, to-wit: D. M. Gibbs, S. Frist, Nelson Button, H. Overholser, F. J. Watson to serve and act as such until their successors should be elected and qualified as set forth in following

Order of Incorporation of the Village of Oklahoma City.

TERRITORY OF OKLAHOMA, } *ss:*
Second County, }

COUNTY CLERK'S OFFICE FOR SAID COUNTY, *July 15th*, 1890.

Now on this day the board of county commissioners within and for said county of Second and Territory of Oklahoma met
70 pursuant to adjournment.

Present: W. F. Higgins, Franklin Springer, J. A. Hartzell, county commissioners and John M. Martin, county clerk within and for said county.

And thereupon came J. H. Woods who appears for the taxable inhabitants of the towns of Oklahoma City, in said Second county in the Territory of Oklahoma, whose signature appears upon the petition hereinafter named and for said taxable inhabitants presented to said board of county commissioners the petition of G. D. Munger, S. K. Hawkins and five hundred and more others, which petitions are hereto annexed who are taxable inhabitants and residents of the

town of Oklahoma City, praying that the south half of the north east quarter of section No. (33) thirty three in township (12) twelve, north range three (3) west, and the south east quarter of section thirty three (33) of township twelve (12) north range three (3) west, and the north east quarter of section four (4) township eleven (11) north range three (3) west of the Indian meridian, all in Second county and Territory, of Oklahoma, and thereupon the said board of county commissioners proceeded to hear and determine said petition and the said board having examined the said petition and the signatures thereto and the affidavits attached to said petition and having sworn and examined various witnesses who were taxable inhabitants and residents of the said town of Oklahoma City and having heard the arguments of counsel and being fully advised in the premises do find and determine that the averments of said petition and each and all of them are true and that a majority of the taxable inhabitants of the proposed village have signed said petition, and that inhabitants to the number two hundred and more are actual residents of the territory in said petition described, and the
71 said board of county commissioners being satisfied that a majority of the taxable inhabitants of the proposed village of Oklahoma City have signed said petition so as aforesaid presented to said board and that inhabitants to the number two hundred and more are actual residents of the territory described in said petition, it is therefore by the said county board now ordered and declared that the said proposed village of Oklahoma City and it thereby is incorporated as prayed for in said petition, and that the metes and bounds be and they hereby are designated as follows: Commencing at the north east of the south half of the north east quarter of sec. thirty three (33) of township twelve (12) range three (3) west of Indian meridian in Second county of the Territory of Oklahoma and running thence south to the south east corner of the *the* north east quarter of section four (4) of township eleven (11) north range three (3) west of Indian meridian, Territory of Oklahoma, thence west to the south west corner of the north east quarter of said section four (4), thence north to the north west corner of the south half ($\frac{1}{2}$) of the north east quarter of section thirty three (33) of township twelve (12) as aforesaid, thence east to the place of beginning containing four hundred (400) acres of land more or less according to Government survey and which said land is more particularly described as follows: the south half ($\frac{1}{2}$) of the north east quarter and the south east quarter ($\frac{1}{4}$) of sec. thirty three township twelve (12) north range three (3) west and the north east quarter of section four (4) township eleven (11) north range three west of Indian meridian all in Second county Oklahoma Territory; and it is by the board of county commissioners of said county further ordered and declared that the corporate name of said village shall be the village of Oklahoma City and the same is
72 hereby declared an incorporated village under the said name and style of the village of Oklahoma City and it is hereby

further ordered and declared that from and after this date the inhabitants residing upon said lands herein described shall be a body politic and corporate by the name and style of village of Oklahoma City, and they and their suc-essors shall be known in law and have perpetual suc-ession, sue and be sued, defend and be defended in all courts of law and equity; contract or be contracted with, acquire, hold and convey property real and personal; have a common seal which they may change and alter at pleasure; and such other and further powers as may be conferred by law and further may do any and all acts that *is* lawful for incorporated villages to do, under and by virtue of the law of this territory in relation to incorporated villages. And it is further ordered by said board of county commissioners that D. W. Gibbs, S. Frist, Nelson Button, H. Overholser, F. J. Watson be and they hereby are appointed trustees in and for said village of Oklahoma City, who shall hold their offices and perform all the duties required of them by law until the election and vualification of their suc-essors in the manner provided by law.

Witness our signatures and seal of the county hereto subscribed this 15th day of July, A. D. 1890.

[COUNTY SEAL.]

JOHN M. MARTIN, *Clerk.*
FRANKLIN SPRINGER.
J. A. HARTZELL.

73 EXHIBIT "H."

Organization.

On this the 22nd day of July, 1890, met at the court house in the Second county of Oklahoma Territory, D. W. Gibbs, T. J. Watson, N. Button, Sam Frist, H. Overholser, the duly appointed trustees for the village of Oklahoma City, who were sworn in by J. M. Martin, clerk of said county, proceeded to organize by electing D. W. Gibbs president of said board, on motion of T. J. Watson, T. M. Upshaw was elected clerk, who after being sworn in as such proceeded to the performance of said duties.

Motion made and carried that the attorney, H. H. Howard be requested to meet with the board and advise as to further proceeding.

The following resolution was offered by H. Overholser, and the yeas and noes being called was adopted unanimously.

Resolved. That we now proceed to call an election, for officers of a city of the second class, and to organize such city.

The board then adjourned until 1 o'clock p. m.

The board met at 1 o'clock as per adjournment with President D. W. Gibbs, presiding and all members of the board present.

On motion of N. Button, the rules were suspended by a unanimous vote of the board, and the following ordinance dividing the city into four wards was read three times and the yeas and noes being called, the same was adopted unanimously.

74 EXHIBIT "I."

TERRITORY OF OKLAHOMA, } ss:
Second County, }

Before the board of county commissioners within and for said county and Territory.

To the honorable board of county commissioners of the Second county, Territory of Oklahoma:

We the undersigned taxable inhabitants of the town of Oklahoma City, situated in the said Second county of said Territory, do hereby petition and pray you that we may be incorporated as a village under and by the name of Oklahoma City, and that the metes and bounds of the proposed village be as follows; to-wit: Commencing at the north east corner of section thirty-three (33) township twelve (12) north, range three (3) west of Indian meridian, Territory of Oklahoma and running thence to the southeast corner of northeast quarter of section four (4) township eleven (11) north range three (3) west of Indian meridian, Territory of Oklahoma, thence west to the southwest corner of northwest quarter of said section four (4), thence north to northwest corner of the southwest quarter of said section thirty-three (33), thence east to northwest corner of said southwest quarter of said section thirty-three, thence north to northwest corner of northeast quarter of said section thirty-three (33), thence east to the place of beginning, containing eight hundred (800) acres of land more or less, according to U. S. Gov't survey.

We further represent and show to you that we are all taxable inhabitants of the said town of Oklahoma City, and that we are each and all inhabitants *of the said town of Oklahoma City, and that we are each and all inhabitants* and actual residents of the said town and reside within the metes and bounds above described and that
75 there are in said town of Oklahoma City inhabitants to the number of two hundred (200) and more who are actual residents of the Territory above described in this petition. We further represent and show to you that the said town of Oklahoma City has not heretofore been incorporated under any law of the said Territory of Oklahoma.

Names.

L. H. Graham, T. B. Roberts, S. E. McConnell, T. McConnell, E. W. Burns, Geo. F. Graham, John Wilkerson, Thos. P. Gorman, Geo. O. Gorman, W. B. Bain, W. D. Gault, W. R. Jacobs, W. S. Aikins, A. G. Wall, Frank Dupers, Ed Ferguson, B. G. Avery, J. G. Spene, John Hrabe, E. F. Hutchinson, Wm. Hulycha, O. E. Cody, J. Kaufman, T. J. Newel, S. R. Newel, J. F. Martin, S. G. Sperry, D. C. Ellison, J. A.

Swope, S. N. Logan, J. B. Lewis, M. W. Hanley, A. L. Frick, W. C. Carrington, S. A. Steward, H. S. Butler, John McNeish, H. H. Mullins, Wm. Smith, C. L. Arnold, W. B. Berry, Rodulph Swartz, J. W. Stanfield, Geo. Ross, G. T. Wright, Peter Gibbins, Jas. M. Brogan, John Hood, E. J. Beale, J. Burton, O. G. Lee, W. A. Thompson, T. R. Hurd, Louis Scheider, John Muranzky, J. R. Scoot, D. P. Writne, L. L. Land, E. L. Blackwood, I. N. Phillips, J. D. Troop, H. M. Py; es, Ben Crayfroft, Geo. T. Young, C. E. Baker, D. H. Torbett, D. H. Phillips, J. W. Abernathy, E. J. Kellar, G. Washington Pence, A. H. Niles, W. M. Adams, R. W. McAdams, Richmond H. Swaile, H. E. Foster, C. Bush, G. R. Brokeck, T. M. Upshaw, R. S. Fisher, B. B. Ros, Victor Sherman, Albert Rey, A. L. Battles, W. S. Marshall, J. C. Whaley, H. F. Butler, H. F. Betts, Joe Smith, I. M. Brown, B. F. Card, Lutte F. Pyles, A. A. Whitson, J. O. Casler, J. J. Lowe, J. C. Hickey, C. S. Cooper, M. S. Miller, T. W. Williamson, Lewis Brown, C. B. Haley, John Fowler, Carter Townley, Frank Bowden, H. H. Haley, J. B. Rolater, A. Meyer, Fred H. Bonner, W. A. Monroe, D. P. Gunter, J. A. Haning, C. Hast, C. F. Renlor, J. W. Brusha, E. F. Field, 76 F. Harrah, W. Church, F. Starzinger, J. I. Chase, W. B. Adamson, Davidson Case, F. M. Blankenship, J. B. Otto, J. P. Benson, A. Short, E. E. Kiwkie, F. C. Rice, J. C. Romick, F. O. Miller, Charles Redenbauch, W. P. Blackburn, C. A. Tomlin, Geo. R. King, W. R. Orne, M. C. Brown, J. E. Bell, R. L. Overstreet, C. H. Peters, John Hubatka, John Ruzichey, Joseph Sventa, F. V. Brandom, J. S. Lindsley, G. M. Houston, C. S. Vanderburg, Kellar Warren, J. S. Eads, J. S. Davis, Geo. Coen, C. E. Wage, Ed Chaney, G. M. Barr, W. I. Hines, G. F. Dean, T. N. Haynes, C. D. Harvey, A. Calhoun, J. P. Hickey, J. G. Ware, S. E. Bartell, Will Rickets, John C. Smith, G. C. McCutchen, J. A. Ryan, C. Fisher, A. B. Hammer, H. A. Hammer, J. E. Bundy, H. H. Black, Melvin Barber, J. W. Haley, L. Morris, F. P. Ross, H. B. Jones, J. C. McCarney, J. T. Brown, H. De Land, J. E. Chism, A. T. Brown, M. P. Brown, A. L. Price, J. C. Williams, J. F. Swejkoosky, Marion Cross, A. C. Anderson, F. H. Morgan, I. M. Huntsman, H. F. Crod, Heinallomt, Phillip Monroe, David Wolfe, John Schwrappather, R. Y. Chander, H. T. Betts, W. H. Burdick, W. A. Watkins, J. E. Basset, J. Bunyan, Garrison, D. S. Graham, Jas. Whittaker, F. J. Bradford, James Dowen, A. H. Rimes, Charley Vest, J. Y. Benton, C. L. Rhodes, P. Rhodes, Jim Reynolds, O. A. Mitscher, H. W. Clergern, C. W. Meyers, Sam Murphey, Frank Inglis, Charlie Rowley, Henry Rowley, R. C. Grubbs, J. D. Brown, H. B. Mitchell, B. F. Allen, D. M. Card, J. R. Green, J. L. Brown, James H. Wallace, Geo. G. Hunt, Wm. Hankins, R. D. Brownell, Jim Rae, Sam Jenkins, G. W. Jenkins, D. D. Leach, Wm. H. Monroe, Emil Bracht, John Eliason, John W. Bryant, Ray S. Reagon, J. O. Carlton, W. S. Bolar, Guy Cot, G. B. Fey, Chas. Gall, Geison Bows, L. W. Beusf, F. S. Dewey, J. B. Coonse, C. B. Boyle, B. J. Miller, John McKee, E. W. Burns, V. Balzer, E. Balzer, Gus Klein, Wm. McCoy, L. W. King, A. Dunham, Fred Comstock, Arthur Hyde, Frank Hall, H. Will, Edward Lowe, Henry Story,

N. N. Miller, N. D. McCarn, J. A. Bailey, N. N. Meller, Christian Cramer, F. E. Scott, G. A. Mitchell, W. H. Baker, C. E.
77 Ettinger, J. G. Tannor, Geo. Kezer, W. Keunkle, C. E. Benian, A. Pettyjohn, J. W. Rheudy, J. D. Winkle, W. V. Wallace, Wm. Roe, R. Poplin, Max H. Wagner, J. J. Wetzel, Robert J. Ray, R. R. Connella, Sam Murphy, S. R. Thornberger, Phil Jones, W. J. Wolds, J. Vance Lewis, Oscar Anderson, H. T. Betts, J. W. Gorman, D. W. Roberts, Robert Kelley, George Kells, Tom Kelly, R. J. Coons, John Wand, Ed. Grayson, T. C. Williams, Herman Turk, Sig Warner, Samuel Warner, Jas. Reughon, Geo. Selby, J. H. Barry, Rudolph Schwartz, Jas. Clemmen, B. F. Meek, A. McMaster, C. Bright, W. C. Thompson, J. W. Fennen, Joseph Young, John Hrashey, George F. Graham, C. F. Gilpin, W. D. Gault, C. R. Chitwood, J. T. Hill, J. D. Dyer, Jas. McCrahanan, Jerry Williams, W. P. Williams, W. Markwell, C. A. Jones, Ira Vandozer, J. W. Foster, Thos. Blaise, F. Belknak, V. S. A. W. Dunham, agent A. T. S. F. M. J. Williams, G. R. Brobeck, John Erichson, T. B. Roberts, G. W. White, J. W. Davis, jeweler, E. P. Davis, W. W. Asher, J. C. Bigelow, H. J. Cappenger, G. H. Newey, Lon Kinton, R. H. Williams, Geo. G. Garrison, Walter Penney, J. M. Hart, A. B. Woodruff, Andrew Wells, G. W. Parker, Sam McPherson, Chas. H. Pack, B. H. Kelley, R. A. Moore, Wm. T. Miller, N. L. Turner, W. S. Defenbaugh, W. C. Schultz, I. M. Forrest, Chas. Balzer, E. E. Henderson, C. H. Beam, Jacob Morris, J. C. Hall, J. D. Bryant, J. N. Lund, W. H. Stamper, A. A. Smith, S. Hendrey, J. M. Nanson, E. B. Pugh, H. H. Hillman, C. W. Routh, B. R. Harrington, Walter Briggs, S. A. Brownwell, N. O. Kelly, J. H. Stophs, W. G. McGee, S. C. Cooke, H. B. Ca-ey, T. C. Hughes, J. V. Gordy, N. I. Niswanger, Dowden & McGlinchey, E. W. Dowden, H. P. Bundy, J. C. Laird, W. C. Arnold. H. C. Way, I. M. Folson, H. C. Aikins, C. J. Babcock, W. A. Grason, O. Weidwenhalt, S. J. Milligan, O. F. Johnson, A. Hamilton, B. C. Fitzgerald, Wm. Clegne, J. A. Ruhl, J. T. Wyatte, J. H. Wyatte, J. T. Farrell, J. G. Benney, Wallace and Limbocker, Ben. De Gee, Geo. W. Fahs, J. R. Harvey, E. C. Hamill, J. D. Arnold, F. P. Whitesides,
78 S. D. Johnson, P. S. Stribling, E. T. Word, A. Morrison, G. J. Laurence, S B. Dyer, J. A. Haning, M. G. Murall, A. L. Winn, A. B. Hammer, J. M. Hobson, H. J. Knopp, Andrew Wardment, Eugene Wallace, J. H. Wheeler, R. D. Davis, John Wallace, Robert Kincaid, E. Elteman, Wm. McMullin, J. P. Boyle, Geo. Farrah, H. W. Sawyer, John Gallegher, G. R. King, A. Haley, Fred Neal, Chas. R. Rivian, William Wills, I. Lewenstein, T. D. Smith, N. Winnenpaugh, Thos. B. Winningham, Chas. E. Mach, J. B. Banks, E. Overholser, Jas. Frasier, Ben Massey, Dan T. Murray, S. E. McConnell, C. S. Yates, J. O'Rouke, Maurice Rider, F. C. Seiger, Thos. V. Gorman, Geo. O. Gorman, J. M. Cunningham, Wm. Alexander, W. R. Jackson, J. B. Kingham, G. W. R. Chinn, C. G. Jones, David Carson, Y. V. Featherby, Frank Brown, S. B. Owlender, J. J. Spencer, J. E. Harwell, John Christianson, F. M. Maxey, H. Lancester, C. D. Hakes,

William Vance, Swan Johnson, Jesse Markland, I. M. Huntsman, P. V. Hillman, H. T. Croil, S. E. Stule, Henry Tylor, I. B. Hrabe, Frank R. Hrabee, Joseph Coing, J. D. Buntley, Frank Kozats, Perry C. Glines, Henry A. Smith, Chas. A. Gitz, Oliver Shaw, W. D. Avery, John Scwoppacher, Joseph Scott, R. Y. Chandler, A. W. Whitson, W. H. Burdick, Wm. Becker, F. H. Morgan, A. C. Anderson, W. H. Winebrenner, Albert Hauskins, G. W. Chin, Jr., D. W. Olin, T. J. Watson, N. Z. Hurd, J. E. Y. Owens, S. N. Logan, J. A. Swope, W. P. Searks, S. E. Davis, Ben Dierke, Jerry Williams, D. E. Strong, James C. Mann, F. A. Wiese, W. W. Mitchell, C. A. Winslow, W. Markwell, Ed Markwell, Jr., F. Ballion, John Frees, Chas. McGoughey, E. L. McCawes, T. W. Cunningham, W. D. Parker, Robert Evans, Joseph Linton, A. L. Cortz, W. H. Bean, A. H. Ninard, John Wells, S. P. Perkins, E. T. Freeman, Joseph Cook, R. W. Wells, J. H. Gaines, Ocie Garver, Mat Jones, Hugh Kelley, Frank Novak, H. L. Wells, George Harn, F. S. Hamilton, Thos. Johnson, W. H. Comby, John Bruckhart, W. A. Watkins, Frank G. Wall-ce, R. Ruffin, Thos. Lewis, J. H. Wilson, J. M. Nebolt, H. E. Diele, M. E. Eastus, F. A. Hazen, H. H. Niles, E. W. Nepes, A. E. Hazel, A. J. Hane, H. Nicholls, George A. Gray,
79 H. N. Dunlap, D. H. Martindale, J. H. Vance, Henry Davis, S. Goodwin, W. E. Honeygrove, W. M. Johnson, H. R. Stovall, W. A. Wade, W. T. Gilley, J. B. Wheeler, J. Wallace, L. E. Esten, P. G. Burns, J. W. Nicely, A. E. Macy, Henry P. Grum, W. S. Field, H. Overholser, H. C. Boykins, John Ragon, William Ruse, J. N. Reynolds, J. W. Tindall, John Bontley, N. B. Taylor, Frank Woolf, Maria Bontley, Julius Bontley, A. H. Hubuckas, John Hrabe, Anton Breitz, Albert Buesck, Mary Hrabe, F. K. Vandrews, Kicalayicks, Frank Hrabe, J. B. Hrabe, Frank Shorne, A. L. Kose, Frank Kozak, Frank Berry, J. W. Adams, Charles Shoney, G. H. Biles, S. S. Biles, T. J. Starr, O. C. Gowan, B. F. Mecks, J. J. Queenan, S. D. Queenan, Geo. H. Remington, Geo. Misner, W. B. Alexander, John I. White, Isaac Williams, C. F. Smith, Jerry Williams, I. D. Dyer, Rick Henderson, J. C. Bigelow, Lewis Donweather, H. C. Scott, Willie Goodson, Chas. Hathway, J. H. Cunningham, John Stsothatte, Jno. Kington, Chas. Birds, A. B. Beard, W. H. Deffenbaugh, Harmon Turk, W. J. Woods, S. E. Warst, Frank Pickrel, C. H. Eagin, Chas. E. Eagin, Chas. E. Harwood, C. Lenord, S. C. F. Norman, J. O. Gurbbs, S. Hendrey, W. W. Boyd, W. H. Stamber, A. A. Smith, S. M. Nanson, B. C. Minor, J. M. McClung, A. J. Brown, H. H. Smith, W. F. Busch, W. H. Horn, O. J. Hill, J. T. Hill, Chas. Irenfield, William Smith, C. M. Terrill, R. Fulkerson, M. I. Brown, Jno. Ayers, W. P. Kendall, S. B. Dyer, R. Brown, C. W. Cunningham, W. C. C. Isaacs, J. G. Patson, W. R. Brusha, J. P. Freeman, Jas. M. Granahan, C. G. Richach, James R. Ellise, M. Barker, J. B. Hitchcock, J. T. Seaton, J. T. Ellard, J. Ellard.

80 TERRITORY OF OKLAHOMA, } ss:
Second County, }

J. M. McClung being first duly sworn on oath says that he carried the above and foregoing petition for the incorporation of the town of Oklahoma as a village, and procured the signatures thereto. That he is acquainted with the persons whose names are signed to said petition and that he knows that said signatures are genuine signatures of the persons who signed their names thereto, and that all the persons whose names appear on said petition and who signed the same are taxable inhabitants of the said town of Oklahoma City and that they each and all are inhabitants of and reside within the Territory described in the above and foregoing petition.

J. M. McCLUNG.

Subscribed and sworn to before me this first day of July, 1890.

ROBERT A. DAVIS,
Notary Public.

81 TERRITORY OF OKLAHOMA, } ss:
Second County, }

H. A. Hammer being first duly sworn on his oath says: I am one of the enumerators appointed by Governor G. W. Steele to take a census of the city of Oklahoma, Oklahoma Territory, and that I have examined the names signed to the foregoing petitions and do swear that the persons who have signed the same are a majority of and more of the taxable inhabitants residing on the area described in said petitions.

(Signed) H. A. HAMMER.

Subscribed and sworn to before me this first day of July, 1890.

WILL H. CLARK, *Clerk,*
By H. P. GREEN, *Deputy.*

82 And thereafter on the 7th day of July, 1900, the following proceedings were had in said cause, to-wit:

83 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant.

Case No. 2053. Journal Entry of Judgment.

Be it remembered that this cause came regularly on to be heard upon the petition of the plaintiff, the answer of the defendant and

reply of the plaintiff, and the plaintiff being present in person and by his attorneys, H. H. Howard and F. J. Kearful, and the defendant being present by its attorneys, John H. Wright and Douglas and Douglas, trial by jury was waived by both parties and the case proceeded to trial before the court without a jury; and the court having heard the evidence of both parties in support of the issues on both sides and having heard the arguments of counsel and being fully advised in the premises, on the 7th day of July, 1900, it is by the court found, ordered, adjudged and decreed: That the plaintiff is the legal and equitable owner and entitled to the possession of the following described real estate and premises situated in Oklahoma county, Territory of Oklahoma and being a part of the south-east ¼ of section 33, township 12 north of range 3 west of the Indian meridian: Commencing at a point in said Oklahoma City at the southeast corner of block 23 thereof, as shown by the trustees' plat of said city now in use as the plat of said city, and on file in the office of the register of deeds of said county, and running thence southerly on a straight line with the west line of Broadway street, as shown by said plat, thirty-three and ten one hun-
84 dredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning, thence west from said place of beginning 140 feet, thence south at a right angle with the line aforesaid 50 feet, thence east parallel with said east and west line first named 140 feet, thence north parallel with said north and south line 50 feet to the place of beginning; that the defendant, since November 14th, 1892, has unlawfully kept the plaintiff out of possession and now unlawfully keeps the plaintiff out of possession of said described property; that the value of the use of said property since November 14th, 1892, is $250.00 per year; that the plaintiff do have and recover of and from the defendant the possession of said described real estate, together with damages for the wrongful detention thereof in the sum of $250.00 per year for the period of three years next prior to the date of the commencement of this action up to date of the execution of this judgment, and that the plaintiff have judgment against the defendant for the costs of this action taxed at — to which order and judgment of the court, and to each and every part thereof the defendant then and there excepted and excepts; and thereupon the defendant, by notice on the journal of said court, demanded a second trial of said action as provided by statute in ejectment, which said demand is granted and this order and judgment is by the court set aside and vacated and a second trial of said action is by the court ordered and allowed, and said cause is continued to the next term of the said court.

B. F. BURWELL, *Judge.*

The above is satisfactory.

SELWYN DOUGLAS.

2053. Frank McMaster, plaintiff, *vs.* the City of Oklahoma
85 City, defendant. Journal entry of judgment. Filed in district court of Oklahoma county, O. T., August 16, 1900. B. D. Shear, clerk. By M. McKinley, deputy.

And thereafter on the 21st day of Jan. 1901, plaintiff filed the following motion in said cause to-wit:

86 OKLAHOMA TERRITORY, }
Oklahoma County. }

In the District Court.

FRANK MCMASTER, Plaintiff, }
vs. } No. 2053. Motion to Set Aside, etc.
OKLAHOMA CITY, Defendant. }

Now comes Frank McMaster, plaintiff herein and moves the court to set aside and hold for naught any order stay or proceeding made herein upon a notice for a new trial, as a matter of right, and without other cause or showing, herein by the defendant. For this that; Said notice and all proceedings thereunder or founded thereon are wholly void without right or authority of the statutes of Oklahoma Territory.

Wherefore plaintiff asks that any orders or proceedings taken by reason of said notice be set aside and held for naught and that plaintiff have execution herein under the judgment herein heretofore entered in his favor at the trial aforesaid.

FRANK McMASTER,
Pl'ff's Att'y.

No. 2053, McMaster *vs.* Oklahoma City. Motion to set aside. Filed in district court, Oklahoma county, O. T. Jan. 21, 1901. B. D. Shear, clerk. By M. M. McKinley, deputy.

87 I hereby certify, that the typewritten instrument hereto attached is a true and correct copy of section 618 and 619, article 24, chapter 66, of the General Statutes of 1893; that I have compared said sections 618 and 619, as published in General Statutes of 1893, with the enrolled bill on file in this office, entitled "An act to provide a civil code of proceedure for the Territory of Oklahoma," which bill was passed by the second Legislative Assembly of Oklahoma Territory and signed and approved by the governor of said Territory on the 16th day of March, A. D., 1893, and find the same to be a correct copy of the corresponding sections of said bill.

I further certify, that said sections have not been repealed nor amended and are existing statutes of Oklahoma Territory. That said enrolled bill bears the following endorsement:

"Approved March 16, 1893. A. J. Seay, governor."

Witness my hand and the great seal of the Territory of Oklahoma at Guthrie, Oklahoma Territory, this fifth day of October, A. D. 1900.

[SEAL.]

WM. M. JENKINS,
Secretary Oklahoma Territory.

SEC. 618. In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial, by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term.

SEC. 619. No further trial can be had in such action, unless, for good cause shown, a new trial be granted, or the judgment be reversed, as in other actions.

88 And thereafter on the 11th day of Feb. 1901, the plaintiff filed the following motion in said cause, to-wit:

89 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Case No. 2053.

Motion to Vacate Order Granting Second Trial.

Comes now the plaintiff and moves the court to make and enter an order setting aside and vacating the order heretofore made granting to the defendant a second trial of the above entitled cause as a matter of right upon its simple demand therefor by notice on the journal, and without cause, for the reason that the court had no power or jurisdiction to make said order granting said second trial as a matter of right without cause, said power having been exercised under section 4496, Oklahoma statutes, 1893, which statute is wholly void as being in direct contravention of that portion of the seventh amendment to the Constitution of the United States which declares:

"In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

FRANK MCMASTER, *Plaintiff.*
F. J. KEARFUL,
Att'y for Plaintiff.

2053. Frank McMaster *vs.* City of Oklahoma City. Motion to vacate order granting second trial. Filed in district court, Oklahoma Co., O. T. Feb. 11, 1901. B. D. Shear, clerk. By M. McKinley, deputy.

90 And thereafter on the 29th day of April, 1901, the following proceedings were had in said cause, to-wit:

91 FRANK McMASTER *vs.* OKLAHOMA CITY. } Case No. 2053,

Now on this 29th day of April, 1901, this cause came on to be heard by the court on motion of plaintiff to re-instate judgment in said cause rendered on the 7th day of July, 1900, and on consideration thereof, the court sustained said motion, to which the defendant then and there excepted, and still excepts, and afterwards and on said day in open court the defendant filed motion for new trial. And it is ordered that judgment be and is hereby stayed until further order of the court or judge.

92 And that said motion of defendant for new trial last referred to is in words and figures as follows, to-wit:

93 TERRITORY OF OKLAHOMA, *County of Oklahoma,* } *ss:*

In the District Court.

FRANK McMASTER, Plaintiff, *vs.* THE CITY OF OKLAHOMA CITY, Defendant. } Motion for New Trial.

Now comes the said defendant, The City of Oklahoma City, and moves the court to set aside and vacate the judgment heretofore rendered and set aside by the court in said action on the 7th day of July, 1900, and again, upon motion of plaintiff, reinstated by the court on the 29th day of April, 1901, and to grant said defendant a new trial of said action, for the following causes which affect materially this defendant's substantial rights, to-wit:

1. Irregularity in the proceedings of the court by which the said defendant was prevented from having a fair trial.

2. Certain orders made by the court by which the said defendant was prevented from having a fair trial.

3. Abuse of discretion by the court by which said defendant was prevented from having a fair trial.

4. Irregularity of the proceedings of the prevailing party by which said defendant was prevented from having a fair trial.

5. Misconduct of the prevailing party.

6. Accident and surprise which ordinary prudence could not have guarded against.

7. Said judgment is not sustained by sufficient evidence, and is contrary to the evidence.

8. Said judgment is not sustained by any evidence.

94 9. Said judgment is contrary to law.

10. Newly discovered evidence material for said defendant and which said defendant could not with reasonable diligence have discovered and produced at the trial.

11. Errors of law occurring at the trial and excepted to by said defendant at the time.

THE CITY OF OKLAHOMA CITY, *Defendant*,
By JOHN H. WRIGHT, *City Attorney, and*
DOUGLAS AND DOUGLAS, *Its Attorneys.*

No. 2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Motion for new trial. Filed in district court, Oklahoma county, O. T., April 29, 1901. B. D. Shear, clerk. M. McKinley, deputy.

95 And thereafter on the 1st day of June, 1901, the following proceedings were had in said cause, to-wit:

96 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court within and for said County.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Journal Entry of Order.

Now on this 1st day of June, 1901, it being one of the judicial days of the regular February, 1901, term of said court, this *this* cause came on to be heard upon the motion for a new trial of said cause, filed herein by the plaintiff on the 29th day of April, 1901, and thereupon the said plaintiff moved that said motion of defendant for a new trial of said cause be stricken from the files of said cause and be not considered for the reason that said motion for a new trial was not made and filed within three days time required by law after the rendition of the judgment in said cause, and which said motion of plaintiff that said motion of defendant for a new trial of said cause be stricken from the files and be not considered, was, upon due consideration of the court, overruled and denied, to which ruling the plaintiff excepted, and thereupon said motion of plaintiff for a new trial of said cause was duly submitted and argued by counsel for plaintiff and defendant, and the court, having heard the arguments of counsel and having duly considered the same and being fully ad-

vised in the premises, the said motion for a new trial is by the court overruled, to which order of the court, so overruling said motion for a new trial, the said defendant, The City of Oklahoma City, then and there duly excepted and excepts and, upon the application of said
97 defendant, forty five days is given to said defendant to make and serve a case-made herein for the supreme court of said Territory, and the plaintiff is granted and allowed ten days thereafter in which to suggest amendments to said case-made, and said case-made shall be presented to the judge of said court for settlement upon five days notice given by either of said parties; and it is further ordered that a stay of execution for twenty days in said cause is hereby awarded and allowed without bond, and said defendant is allowed said period of twenty days within which to execute a supersedeas bond to said plaintiff conditioned as by law required for the further stay of execution pending the prosecution of its appeal on error to the supreme court *by* the Territory, with good and sufficient sureties to be approved by the clerk of said court in the sum of two thousand dollars.

B. F. BURWELL,
Judge of said Court.

Endorsements: 2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Order. Filed June 1, 1901. B. D. Shear, clerk, by M. McKinley, deputy. Filed Aug. 5, 1901. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

98 And thereafter on the 8th day of July, 1901, the following proceedings were had in said cause, to-wit:

99 TERRITORY OF OKLAHOMA, } *ss:*
Oklahoma County, }

In the District Court of the Third Judicial District Held in and for said County and Territory.

FRANK MCMASTER, Plaintiff, }
vs. }
THE CITY OF OKLAHOMA CITY, Defendant. }

Now on this the 8th day of July, 1901, the above entitled cause came on to be heard on motion of defendant for an extension of time in which to make case for supreme court, and for good cause shown, said time is hereby extended to August 1st, 1901, and ten days thereafter to suggest amendments, and five days to serve case thereafter.

B. F. BURWELL,
District Judge.

I have examined the foregoing case made, after due service thereof, and have no amendments to offer and accept the same as correctly

presenting the records and evidence in said case. And agree that the same may be settled and signed as of this date.

FRANK McMASTER, *Plaintiff.*

Dated July 17th, 1901.

Filed August 5, 1901,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

100 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

This is to certify that the above and foregoing case-made has been served in due time, and that said case-made was duly submitted to me for settlement and signing as required by law, by the parties to said cause, appearing before me by their respective attorneys; that the said case-made as above set forth is true and correct and contains a true and correct stat-ment of all the pleadings, motions, orders, evidence, findings, proceedings and judgments in said cause; and I hereby settle, allow, certify sign and file the same as true and correct, and I do hereby attest the same with my name and file the same of record as provided by law, and I do hereby order the clerk of this court to attest the same with his name and signature and the seal of said court and file the same of record as required by law.

Witness my hand at Oklahoma City, Oklahoma county, Territory of Oklahoma, on this the 17th day of July, A. D. 1901.

B. F. BURWELL, *Judge.*

Attest: B. D. SHEAR,
Clerk of the District Court, Oklahoma
[SEAL.] *County, Territory of Oklahoma.*

Filed Aug. 5, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

Endorsed: 1126. City of Oklahoma City *vs.* Frank McMaster. Petition in error and case-made. Filed in district court, Oklahoma county, O. T., July 17—1901. B. D. Shear, clerk. Filed, Aug. 5, 1901. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

101 And thereafter on the twenty-sixth day of August, 1901, there was filed in said court a motion to dismiss proceedings in error in said cause, which motion reads in words and figures as follows, to-wit:

102 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK McMASTER, Defendant in Error.

Cause No. 1126. Motion to Dismiss Proceedings in Error.

Comes now Frank McMasters, the defendant in error in said cause, and moves the court to dismiss the appeal and proceedings in error of the said plaintiff in error herein, for and upon the following grounds:

First. The judgment of this case was rendered in the district court on the 7th day of July, 1900, and the petition in error was filed in this court on August 5th, 1901, more than one year after the date of the rendition of the said judgment, and therefore the appeal and proceedings in error in this cause were instituted after a lapse of one year from date of said judgment, and at the time such appeal and proceedings in error were barred by the statutes of limitation of the Territory of Oklahoma. (See Record, pg. 53)

Second. The motion for a new trial in this cause, in the district court, was made and filed on the 29th day of April, 1901, and therefore was filed more than three (3) days after the date of said judgment rendered, to-wit, on the 7th day of July, 1900; and the said motion contained merely the statutory grounds for a new trial which was required to be filed within three (3) days from the date of judgment and no grounds are set forth in said motion as the cause or basis or excuse for the filing thereof, after the said expiration of three (3) days, and none of the grounds set forth in said motion are cognizable or could be sustained by the district court or by this court under the law. (See Record, pg. 63–64)

103 Third. The motion for a new trial of the said cause in the district court is not directed against any order in the record, reinstating the original judgment in the cause, and there is no proceeding or attack upon or against the order of reinstatement. Said judgment and the said order so reinstating said judgment have become final and conclusive.

Fourth. The appeal in this case, by its terms and on its face, is taken from the original judgment only, and is limited to a complaint against the rendition thereof.

COTTERAL & HORNOR,
Attorneys for Defendant in Error.

Service of the foregoing motion by a true copy is accepted this 24th day of August, A. D. 1901.

JNO. H. WRIGHT,
Attorney for Plaintiff in Error.

Filed Aug. 26, 1901,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed: 1126—City Ok. City, pl'ff in error, *vs.* Frank McMaster, def't in error—Motion to strike, etc.—Filed Aug. 26, 1901—Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy. Cotteral & Hornor, att'ys — def't.

104 And afterwards on the third day of September, 1901, there was filed in said court, in said cause, suggestions in opposition to motion to dismiss, which suggestions read in words and figures as follows, to-wit:

105 In the Supreme Court of the Territory of Oklahoma.

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

Comes now the above named plaintiff in error and hereby makes the following suggestions why the motion of defendant in error should be overruled:

First. The district court in the same judgment rendered on the 7th day of July, 1900, set aside said judgment and granted a new trial, and did not reinstate said judgment until the 29th day of April, 1901. Hence there was no judgment for the plaintiff in error to complain of until the last named date, and the plaintiff in error then and there filed its motion for a new trial. As was said by our supreme court in the case of Severly *vs.* C. R. I. Ry. Co. 6 Okla. 153, "A motion for a new trial is a useless proceeding until there is a judgment to set aside or vacate."

Second. The district court found and held that the motion for a new trial was filed in time.

Third. The motion for a new trial covers all the statutory ground.

Fourth. The appeal also claims error on the part of the district court in reinstating said judgment on the 29th day of April, which was duly excepted to by the plaintiff in error, and made one of the assignment- of errors.

Wherefore plaintiff in error prays that the motion of defendant in error to dismiss said appeal be overruled.

Respectfully submitted.

DOUGLAS & DOUGLAS AND
JNO. H. WRIGHT,
Att'ys for Plaintiff in Error.

106 Said suggestions in opposition to motion to dismiss are endorsed as follows:

No. 1126—The City of Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error—In the supreme court of the Territory of Oklahoma—Suggestions—Filed September 3, 1901, Benj. F. Hegler, clerk supreme court.

107 And thereafter, at the June, 1901, term of said supreme court, on the sixth day of September, 1901, the following proceeding was had in said cause, to-wit:

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } # 1126.

And now the court overrules the motion to dismiss this cause, the last order therein having been made within the year allowed for appeal.

108 And thereafter, at the January, 1902, term of said court, on the seventh day of January, 1902, the following proceeding was had in said cause, to-wit:

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } # 1126.

Ordered by the court: That this cause be now taken on briefs of both parties.

109 And thereafter, at the June, 1903, term of said supreme court, on the sixth day of June, 1903, the following proceeding was had in said cause, to-wit:

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } # 1126.

And now this cause comes on for final decision and determination by the court upon the record and briefs submitted therein. And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error, the said City of Oklahoma City.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed at the cost of plaintiff in error, the said City of Oklahoma City.

Opinion by Irwin, J., all the justices concurring except Burford, C. J. and Burwell, J., not sitting, and Pancoast, J., dissenting, in an opinion herewith.

Which said opinion and dissenting opinion read in words and figures as follows, to-wit:

110 In the Supreme Court of the Territory of Oklahoma, June Term, 1903.

Filed June 6, 1903.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } No. 1126.

Syllabus.

1. Where errors are assigned in the petition in error, but are not mentioned in the argument or brief of counsel, and are not relied upon in the argument or brief for a reversal of the judgment complained of, they will be deemed waived and abandoned, and will not be regarded in this court.
2. Where an occupying claimant has entered upon public lands which are open to settlement, and has made settlement thereon, for homestead purposes, and has legal vested rights therein, such rights can not be taken from him for public use, except by due process of law, and the payment of just and reasonable compensation therefor.

Error from the district court of Oklahoma county. B. F. Burwell, trial judge.

Affirmed.

Appearances: Jno. H. Wright and Douglas and Douglas, for plaintiff in error. Cotteral and Hornor, Frank McMaster for defendant in error.

111 *Statement of the Case.*

This is an action brought by the defendant in error Frank McMaster, against the plaintiff in error, The City of Oklahoma City, in the district court of Oklahoma county, on the 22nd day of September, 1899, for the recovery of the possession of two certain lots, to-wit, lots numbers one and two of block number twenty four of the original plat of said city, as filed in the United States Land Office, to recover the possession of said lots, and damages for the wrongful detention thereof. The original petition in said case is in words and figures as follows:

"TERRITORY OF OKLAHOMA, }
Oklahoma County. }

In the District Court, 3rd District.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Petition.

Now comes the plaintiff herein complaining and says:

1st. That the defendant is a municipal corporation of Oklahoma Territory, being a city of the first class, and located in Oklahoma county, aforesaid.

2nd. That the plaintiff is the legal and equitable owner of the real estate herein described, and fully entitled to the possession thereof, and of which the defendant unlawfully keeps him out of the possession, being a part of the south east quarter (1/4) section thirty three (33) town 12, north range 3 west in said county, and Territory more particularly described as follows: Commencing at a point in said city on the south east corner of block twenty three, (23), as shown by the trustees' plat, being the plat now in use in said city, and running thence southerly on a straight line, with the west line of Broadway street, as shown by said plat, thirty three and ten one hundredths, (33.10) feet from the south east corner of the block aforesaid to the place of beginning; thence west from said place of beginning, one hundred and forty feet, (140) thence south at a right angle with the line aforesaid, fifty (50) feet, thence east parallel with said east and west line, first named one hundred and forty feet, (140) thence north parallel with said north and south line, fifty (50) feet to the piace of beginning.

3rd. That prior to the filing hereof being far more than four weeks, thereto, plaintiff presented his claim to defendant for uses, rents, and profits thereon, as well as a demand for possession of said real estate, described as aforesaid, but that the defendant refused to pay said claim, and still retains possession of said real estate, to the damage of plaintiff in the sum of two hundred and fifty, ($250.00) dollars, per year, since the 14th day of November, 1892.

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4th. Said real estate is further described on the Dick plat, being the original plat of said city, as lots No. one (1) two (2) of block No. twenty-four (24) of said plat, as filed in the U. S. Land Office.

Wherefore the plaintiff prays judgment herein against defendant:

1st. For the recovery of said real estate, and damages for withholding the possession thereof.

2nd. For other and further relief.

FRANK McMASTER, *Plaintiff.*

H. H. HOWARD, *Attorney.*

No. 2053. Frank McMaster *vs.* Oklahoma City. Amended petition. Filed Sept. 22, 1899. B. D. Shear, clerk. H. H. Howard, att'y.

To said petition the defendant, on the 10th day of October, 1899, filed its demurrer, in words and figures as follows, to-wit:—

"TERRITORY OF OKLAHOMA, *County of Oklahoma,* } *ss.*:

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Demurrer.

Comes now the defendant, The City of Oklahoma City, and demurrs to the petition of the plaintiff filed on the 22nd day of September, 1899, and for cause and grounds of said demurrer, says: That said petition does not state facts sufficient to constitute a cause of action in favor of plaintiff, and against said defendant.

THE CITY OF OKLAHOMA CITY, *Defendant,*
By JOHN WRIGHT AND DOUGLAS AND DOUGLAS,
Its Attorneys.

#2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Demurrer. Filed in district court Oklahoma county, O. T. October 10, 1899. B. D. Shear, clerk, by M. McKinley, deputy. Re-filed by leave of court, Nov. 20, 1899. B. D. Shear, clerk.

Which demurrer was by the court overruled, to which the defendant excepted.

113 That thereafter on the 24th day of November, 1899, the defendant filed its answer in said cause, which is in words and figures as follows to-wit:—

TERRITORY OF OKLAHOMA, *County of Oklahoma,* } *ss.*:

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Answer.

1. Now comes the said defendant, The City of Oklahoma City, and for answer to the petition of said plaintiff in said cause, on the 22nd

day of September, 1899, denies each and every allegation and averment therein contained, except such as hereinafter expressly admitted.

The said defendant admits that it is a municipal corporation and city of the first class, as alleged in said plaintiff's petition.

2. The defendant further answering says that the tract and parcel of land claimed by said plaintiff and described in said plaintiff's said petition, is a part of the original townsite of the city of Oklahoma City, in the Territory of Oklahoma, and is situated and is included in and is a part of Grand avenue, a public highway and street of said city, as the same appears upon the original plat and survey of said city, which said plat and survey was approved by said board No. 2, of townsite trustees of Oklahoma City, on the 6th day of September, 1890, and recorded under and by the direction of said board, in the office of the register of deeds of Oklahoma county, Territory of Oklahoma, on the 8th day of September, 1890, in Book No. One of plats of the records of said county, at pages two, three and four of said book.

That said public highway in said city, to-wit, said Grand avenue, with the said land claimed by plaintiff, included therein, was and had been for more than one year prior to the approval of said plat and survey, by said board No. 2, of townsite trustees, and the filing of said plat so approved, in the office of the register of deeds of Oklahoma county, as aforesaid, and has been at all times since, used and occupied exclusively as a public highway, and a street of said city by the inhabitants of said city, and Territory, at all times, and was so exclusively used as a public highway and street long before the organization of said city as a municipal corporation, and that said plaintiff was not during any time in possession of said parcel of land, now claimed by him, and had no interest therein.

Wherefore defendant prays judgment for its costs herein, against said plaintiff.

THE CITY OF OKLAHOMA CITY,
Defendant,
By JOHN H. WRIGHT, *City Attorney, and*
DOUGLAS AND DOUGLAS, *Its Attorneys.*

2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Answer. Filed in district court, Oklahoma county, O. T. Nov. 24, 1899. B. D. Shear, clerk, by M. McKinley, deputy.

114 And on the 5th day of Feb. 1900, the plaintiff filed his reply, in words and figures as follows:—

TERRITORY OF OKLAHOMA, *Oklahoma County,* } ss:

In the District Court.

FRANK McMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } #2053. Replication.

Now comes plaintiff — for replication to the answer filed herein says:—

He denies each and every allegation of said answer, and every and all of the averments therein, which contradict the averments, counts and allegations of the plaintiff's petition filed herein.

Wherefore, he, the plaintiff, prays judgment as asked in said petition.

FRANK McMASTER, *Plaintiff.*
H. H. HOWARD,
Att'y for Plaintiff.

#2053. Replication. Frank McMaster, *vs.* Oklahoma City. Replication. Filed in district court, Oklahoma county, O. T. Feb. 5th, 1900. H. H. Howard, attorney. B. D. Shear, clerk, by M. McKinley, deputy.

And on the fifteenth day of February, 1900, at a regular term of the district court of the third judicial district held in and for Oklahoma county, in the Territory of Oklahoma, the said cause came on for trial before the Hon. B. F. Burwell, presiding judge, jury having been waived, and the plaintiff introduced in evidence patent from the United States Government to the townsite trustees. Objected to. Overruled. Exception. Plaintiff then introduces judgment rendered in the case of McMaster *vs.* The Townsite Trustees, by Justice John H. Burford, on the 14th day of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office, in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception.

Plaintiff then offers in evidence a further order of the district judge, Burford, in the same case, dated October 13th, 1893,
115 with a certificate of the register of deeds of Oklahoma county, showing that the same had been recorded in his office. Objected to. Overruled. Exception. Witnesses are then sworn and testify as to the rental values. Here the plaintiff rests. Defendant demurs to the evidence. Whereupon, attorney for the plaintiff, by leave of the court, introduces as further evidence in the case, the journal and the order made by the court in case No. 278, of the dis-

trict court of Oklahoma county, entitled Frank McMasters *vs.* Edgar N. Sweet, Levi E. Coe and David H. Hammons, townsite trustees. Said order and journal granting a change of venue, in said cause. And thereafter, the said defendant refiles its demurrer to the evidence of the plaintiff; which demurrer is overruled, and exception. The defendant introduces testimony to show the final receipt of the local land office to the townsite trustees. No objection, same is admitted and read in evidence. The defendant then offers in evidence a plat of the city, approved by the board of townsite trustees No. 2. Objection, overruled. Exception.

The defendants proves by the register of deeds that the plat is one of the plats of record in the office of the register of deeds of this county. The defendant offers in evidence entries of the county commissioners' proceedings, in Book One, page- 11-12 and 13. Objection. Overruled. Exception.

Here the defendant rests. Whereupon the court rendered judgment in favor of the plaintiff for the recovery of the possession of said real estate together with damages for the wrongful detention thereof, in the sum of two hundred and fifty dollars per year, for the three years prior to the commencement of this action up to the execution of this judgment, and against the defendant for costs. To which order and judgment of the court the defendant then and there excepted.

116 Whereupon the defendant, by notice on the journal of said court, demanded a second trial, which demand is granted, and said judgment is set aside and vacated, and said cause is continued until the next term of this court.

Thereafter, on the 21st day of January, 1901, plaintiff filed a motion to set aside the order granting a new trial as a matter of right, on the ground that said notice, and the proceedings thereunder are wholly void, without right or authority, and asking that the court reinstate the judgment in said cause, on the 7th day of July, 1900, in favor of the plaintiff, which motion the court sustains, to which the defendant then and there excepts. On the same day the defendant files its motion asking the court for a new trial in said cause, on statutory grounds; plaintiff moves that said motion for a new trial be stricken from the files, for the reason that the same is not filed within the three days' time required by law, after the rendition of judgment, in said cause, which said motion was, upon the consideration of the court, overruled, to which the plaintiff excepts. Whereupon said motion for a new trial in said cause was duly submitted and argued by counsel for plaintiff and defendant, and overruled, to which ruling the defendant excepts, and brings the cause here for review.

Opinion of the court by IRWIN, *J.*:

The assignments of error in this case may be condensed into three, viz: First, overruling the demurrer of defendant to plaintiff's petition. Second, error of the court in setting aside the order of the

court made granting a new trial to the defendant, as a matter of course, without showing cause, entered in the journal, and the reinstating of the judgment in favor of plaintiff; and third, error
117 of the court in rendering judgment in favor of the plaintiff, instead of the defendant.

While the assignments of error made by the plaintiff in error are more numerons than these, we think these three assignments include all of those assigned by the plaintiff in error. Plaintiff in error makes eight assignments of error, but his second and third, it seems to us are included in the first assignment of error as herein set forth. The fourth assignment of error charges that the court erred in admitting as evidence against said plaintiff in error, and over its objection, a copy of a certain pretended judgment of the district court of Canadian county, rendered in an action in said last named court, in which the defendant in error was plaintiff, and the townsite trustees were defendants; and fifth, the court erred in admitting over the objection of the plaintiff in error, a copy of a certain order or judgment of the said district court of Canadian county, made at Kingfisher county, on the 13th day of October, 1893, in an action between the said parties. The sixth and seventh assignments of error are simply general assignments of error in admitting improper evidence on the part of plaintiff, and the eighth, that said district court erred in rendering judgment in favor of defendant in error, instead of plaintiff in error. We think all of the fourth, fifth, sixth and seventh assignments of error can be considered in the eighth, to-wit, that the court erred in rendering judgment in fav or of the plaintiff.

The first and second assignments of error as herein set forth it will not be necessary for this court to pass upon, because by the long established and well settled rule of this court, founded upon the adjudication of many of the supreme courts of other States and Territories, on the same question, these assignments of error have been abandoned by the plaintiff in error. It is a well settled rule
118 of this court that where error is assigned, and the attorney for the plaintiff in error fails to insist upon and argue the same in his brief, this court will treat such assignment of error as having been abandoned.

In the case of Gardenhire *vs.* Gardenhire, 2 Okla. 484, this court says:

"Where errors are assigned in the petition in error but are not mentioned in the argument or brief of counsel and are not relied upon in the argument or brief for the reversal of the judgment complained of, they will be deemed waived and abandoned and will not be regarded by the Supreme Court."

In Peters *vs.* The United States, 2 Okla. 136, this court in an opinion rendered by the present Chief Justice says:

"A number of other rulings of the trial court are complained of and errors assigned calling in question their correctness, but as they

are not discussed in appellant's brief, they must be taken as waived and abandoned, and we shall not give them consideration."

In the case of Hurst *vs.* Sawyer, 3 Okla. 296, this court says:

"An assignment of error, which is not relied upon in the brief of counsel for a reversal of the case, will not be considered by this court, nor will this court review a question partially discussed, when counsel, in closing his brief, chooses to abandon it, and rely entirely upon another proposition, and when counsel on the other side have relied upon such withdrawal."

In Provin *vs.* Lovi, 6th Okla. 94, the court says:

"Where an error is assigned and not presented and argued in the brief of counsel for appellant, and no authorities are cited in support of the contention and counsel for plaintiff treat the question as abandoned, this court will not review the same."

In Penny *vs.* Fellner, 6th Okla. 386, the court says:

"This court will not examine the record filed herein, in search of prejudicial errors which are not clearly pointed out and insisted upon in the brief of the complaining party, but all such errors (if any) will be considered as waived."

In Huntley *vs.* The Territory, 7th Okla. 60, this court says:

"Numerous other errors are assigned in the petition in error. We have considered all that have been presented in the briefs, or argued by counsel for plaintiff in error. Under the settled rule of this court such assignments of error as are not presented and relied upon in the argument or brief of counsel are deemed waived and abandoned, and will not be considered by this court."

119 This doctrine has been repeatedly followed and often sanctioned by the Kansas supreme court. In the case of Topeka Primary Association *vs.* Martin, 39 Kans. 750, the court there holds:

"That errors not specifically pointed out and relied on in the brief of counsel, will not be considered."

In the case of Wilson *vs.* Fuller, 9th Kansas, 176, the court say:

"Where errors are assigned in the petition in error, but no reference is afterwards made to them, either by oral argument or in the brief of counsel for plaintiff in error, the supreme court will take no notice of them."

In School District *vs.* Foster, 11 Kans. 447, it is said:

"Other errors were assigned in the petition in error, but as they have not since been referred to, in the brief of counsel or otherwise, we suppose they have been abandoned, and we shall therefore take no notice of them."

In Davis *vs.* Filmore, 15 Kans. 333, the court holds:

"Where error is assigned but not briefed, it must be presumed to have been waived and abandoned."

In Campbell *vs.* Phillips, 28th Kans., 754, the court says:

"Of course our inquiry will be limited to the single matter counsel discuss in their brief."

In Bailey *vs.* Dodge, 28 Kans, 72, it is held:

"Where errors are assigned but not insisted upon in the brief of counsel, the supreme court will not consider them."

In The State of Kansas *vs.* Stewart, 84 Kans. 250, the court, speaking by Justice Brewer, says:

"Ordinarily this court will consider only such questions as are specifically pointed out and discussed by counsel, and will not search through the record for the sake of finding errors."

This same doctrine is held in Howard *vs.* Cobb, 6th Ind. 5, and in Robinson *vs.* Tipton, 31 Ala. 595.

Hence we take it that this rule is too well established, and has too long been followed by this and other courts to now be disturbed, and as we have carefully and repeatedly searched the brief of plaintiff in error, and do not find as to the first or second assignment of error, the slightest reference, not a word nor a line thereon
120 is contained in such argument, nor are any authorities cited; hence, following the rule, we are constrained to treat these two assignments or error as abandoned, and only notice the other assignments of error, which, in our judgment can very properly be considered in the one assignment of error which charges error of the district court in the judgment rendered.

The evidence in this case shows that the lots in controversy were a part of a tract of land conveyed by the United States to certain trustees for townsite purposes, as shown by the patent in evidence.

By this conveyance the land was to be held in trust by said trustees, for the occupying claimants, and such trustees were made agent for such claimants, and such lands were also held in trust *sub modo* for the Government until the rightful claimants could be established, and the manner of disposing of the surplus land ascertained. This land by the act of Congress was open for legal settlement on the 22d day of April, 1889. The defendant in error, in his petition herein, claims that he had on the day that such land was opened for settlement, and not before, legally entered such lots, and went into possession thereof as an occupying claimant, and that under the rules and regulations of the land office he was entitled to a deed at the hands of the townsite trustees. Now the first question to be settled in this controversy is: Was the defendant in error an occupying claimant, such as is recognized by the land laws of the United States, and entitled to a deed at the hands of the townsite trustees? If this position is correct then under the laws regulating the granting of this tract to the townsite trustees, they held that portion of the same on which he was an occupying claimant, in trust for him. The Government by the conveyance by patent vested the title of this land in the trustees, for the express purpose
121 of having the title conveyed to those who were entitled to claim as occupying claimants. To prove this possession, the defendant in error offered in the court below certain findings of the district court of Canadian county, Oklahoma Territory, which he claims amount to a judgment in his favor, in a certain case therein pending wherein he was the plaintiff and the townsite trustees were

the defendants, said cause having been taken to Canadian county on a change of venue, from the district court of Oklahoma county, where said land is situated, and where said trustees resided.

The objection to the introduction of this judgment, of Canadian county, was that the plaintiff in error here, The City of Oklahoma City, was not a party to that record, and consequently not bound thereby; but it seems to us that as the townsite trustees, by the patent had conveyed to them the land, and by the law under which they acted was made the agent not only of all the occupying claimants, but also of the Government, and held the land in trust for such claimants, that any and all persons claiming title to any portion of such land, must claim the same through the townsite trustees; that the plaintiff in error here, if any title whatever it had, must have derived the same from a common source of title, to-wit, the townsite trustees, and as such grantee of the townsite trustees would be bound by any judgment legally rendered against such trustees.

In the case of Caldwell *vs.* Colorado Springs, 100 U. S. 55, it was held:—

"That as all had a right to appear, it bound all parties. The trustees represent all rights, and their action bound all claimants."

In Kennison *vs.* Stewart, 93 U. S. 84, it was held;

"That all beneficiaries, although not parties, are bound by judgments against trustees, unless such judgment is impeached for fraud or collusion."

122 The second objection urged by plaintiff in error herein to the introduction of this judgment of the district court of Canadian county in the court below, was that the findings do not amount to a judgment. What is a judgment? We think it is a final conclusion by a court of competent jurisdiction of a question of law or fact, at issue between the parties thereto, and properly submitted for adjudication. Now in this case the proper parties were before the court, to-wit: the defendant in error, who claimed the right to a deed, and the townsite trustees, in whom the Government had vested the title, for the purpose of ascertaining who the legal occupying claimants were, and who was entitled to deeds for the various tracts of land embodied in the patent.

Now as the court found the facts and decided the question submitted to it, and as no question of jurisdiction was there raised, and as no question of jurisdiction is raised in the district court in this case, or in this court, on appeal, and as no appeal was taken from the findings and judgment of the district court of Canadian county, we think the presumption obtains that the court had jurisdiction of the subject-matter and of the parties, and that the necessary preliminary steps to give the court jurisdiction had been complied with; this being true, we are at a loss to see why the finding of that court as to the facts therein submitted were not binding and conclusive upon not only the parties, but all persons claiming title under or through them. Now what did the district court of Canadian county find as to the facts? By a reference to the copy of the

records of that court as shown in Exhibit A, of the case made herein, it will be seen that that court there found that the defendants in that case, Edgar N. Sweet, Levi E. Coe and David H. Hammons, were trustees of the townsite of Oklahoma City, in said county, for the benefit of the actual occupants thereof, under the act of Congress approved May 14th, 1890. That said tract of land described in said patent to said trustees, was on the 22nd day of April, 1889, opened to settlement under the
123 act of Congress approved March 2nd, 1889. That such tract of land was settled upon and occupied as a townsite shortly after noon of said day, and has continued to be and was at the time of said finding still held and occupied. The court further finds that on said 22nd day of April, 1889, the people then occupying said townsite had platted said tract of land into lots, blocks, streets and alleys, and the court further finds that the plaintiff there (that is the defendant in error herein) on said day, to-wit: the 22nd day of April, 1889, legally entered upon and occupied the particular piece or parcel of ground in controversy in this suit, and has continued to claim the same, that said piece or parcel of ground at that time was lots one and two in block twenty-four, according to the plat. The court finds that subsequent to such occupancy, and prior to the conveyance to said trustees, a different plat and arrangement of the streets, alleys, lots, and blocks, was adopted and enforced by the parties occupying said townsite; that by said change of the plat, the land claimed by the plaintiff was thrown into the street, in Grand avenue, and the court finds that the plaintiff did not consent, but objected to said second plat, and has never consented thereto or acquiesced therein. That thereafter the plaintiff in that case (defendant in error here) was forcibly removed from said parcel of ground, and has since that time been forcibly kept from the occupancy of said ground. That on the 21st day of April, 1891, the plaintiff applied to said defendants as said trustees, for a deed to said lots, that said trustees found the facts substantially as above stated, but declined to issue a deed therefor, and the court further finds that said city of Oklahoma City has appropriated said lots to its own purposes as a street, and had appropriated the same prior to the conveyance of said tract by the United States to said trustees:
124 the court further finds that said plaintiff was not occupying said tract of ground at the time the United States conveyed the same to the defendants as trustees, but said portion of said tract was at the time used and treated as a street of said city.

Now this finding of the court shows that at the time that this land was opened for settlement under the act of Congress the defendant in error herein had legally entered upon said tract of land, and was occupying it, in accordance with the rules and regulations of the Land Department. That being true we take it that his interest and rights in said land attached at that time. That when he had complied with the rules and regulations of the Land Department, he was entitled to a deed. That he had a vested interest in these lots, and

that any other occupying claimant, or any number of occupying claimants, who made up the townsite, at that time or subsequent, had no right to so change the plat as to take from him his interests in said lots, and put them into a public street or highway without his consent. Such a proceeding would be in violation of the Constitution of the United States, and would be taking private property for public use, without compensation. The townsite trustees would have no right to deprive him of any property that he might have by virtue of his prior settlement, in these lots, and devote it to street purposes, without his consent and without compensation. His rights must be determined, it seems to us, by the conditions as they existed at the time of his settlement, upon these lots, which, according to the findings of the district court of Canadian county, was on April 22nd, 1889. If at that time he had complied with the law, and the rules of the Land Department, and was entitled to a deed, then no subsequent action of the occupying claimants, of the townsite, or the townsite trustees, or the city of Oklahoma City, could take away his rights without his consent, except upon some legal proceeding, and for adequate compensation.

125 In the case of Sturr *vs.* Beck, reported in the 133 U. S. at page 545, the Supreme Court of the United States say:

"* * * Any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws, the ruling of the Land Department has been that if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement."

In Witherspoon *vs.* Duncan, 4th Wall. 210–218, it is said:

"* * * In no just sense can lands be said to be public lands after they have been entered at the land office, and a certificate of entry obtained. If public lands before the entry, after it they are private property. * * *"

In the decision in the case of Sturr *vs.* Beck, *supra*, the court says:

"* * * And as to mere settlement with the intention of obtaining title, under the preëmption laws, while it has been held that no vested right in the land as against the United States is acquired, until all of the prerequisites for the acquisition of title have been complied with, yet rights in parties as against each other were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. 'The patent, which is afterwards issued, relates back to the date of the initiatory act, and cuts off all intervening claimants.'"

In Burlington K. and S. W. R. Co. *vs.* Johnson, 16 Pac. 125, the supreme court of Kansas say:

"A settler on the public lands of the United States who makes a valid homestead entry, and continues to reside on and improve the land entered, in compliance with the land laws, has the exclusive right to its possession and use, and to the improvements made thereon, and he also acquires equities in the land itself, which increase from the time the entry is made until the complete title is earned.

126 "Such a settler may sell and transfer a portion of his homestead for a right of way for a railroad, or his interest therein may be condemned and appropriated for such purpose upon adversary proceedings, and by paying full compensation to the settler therefor.

"A homesteader who has entered, and is proceeding lawfully to perfect his title to the land entered suffers an injury by the building of a railroad over his homestead which differs only in degree from that sustained from the same cause by one who has the complete title."

Section 2339 of the Revised Statutes of the United States provides:

"Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

But it may be contended that the defendant in error was not in the possession of said lots, and has abandoned the same, but a reference to the finding of fact by the district court of Canadian county will show:

"That thereafter the plaintiff was forcibly removed from said parcel of ground, and has since that time been forcibly kept from the occupancy of said grounds."

"That he did not consent but objected to the platting of said land as a street."

And under the holding of this court in the case of Cook *et al. vs.* McCord *et al.*, 9 Okla. page 200, and the holding of the United States Land Department in Betts *vs.* Townley, 20 L. D. 425, this is not abandonment, but preserves his entry intact.

Hence, it seems to us that if the findings of the district court of Canadian county were correct, and that the defendant in error, McMaster, was a legal occupying claimant upon the land at the time the patent was granted to the townsite trustees, then no action of such townsite trustees or the city of Oklahoma City, or the other occupying claimants, could divest him of his right in the property in question, without his consent, and without compensation.

127 We think there was no error on the part of the district court of Oklahoma county, in admitting the record of this judgment as evidence.

The defendant below, plaintiff in error here, claims that the court erred in admitting as evidence a certified copy of a certain order of the district court of Canadian county, made in Kingfisher county. But a reference to that order will show that it was an order designed to execute a previous order of that court. The order was in the nature of a mandamus, which, if the finding of the Canadian county court was that the defendant in error, McMaster, was entitled to a deed, at the hands of the townsite trustees, this would be the only adequate means by which the court could enforce such judgment. But it seems to us that the order made in Kingfisher county, has but little bearing upon the merits of this case, for the reason that the rights of the parties had already been determined, by the finding of the district court of Canadian county, in the order heretofore admitted by the court. If the finding of that court was correct, and, its correctness, it seems to us, cannot now be questioned, after the time for appeal has expired, then McMaster was entitled to a deed at the hands of the townsite trustees, and such finding of the court was conclusive.

Hence, we think the decision of the lower court was correct, and the judgment is hereby affirmed; not intending that this opinion shall be at variance with the doctrine laid down in the case of City of Guthrie *vs.* Beamer, 3 Okla. 652, the facts in the two cases being different.

All the justices concurring except Burwell, J. and Burford, C. J., not sitting, and Pancoast, J., dissenting.

128 Dissenting opinion by PANCOAST, J.:

I cannot concur in the foregoing opinion. McMaster acquired no vested interest in the land claimed by him by reason of his settlement and occupancy thereof; the land upon which he made settlement being designated by the plat and survey as a street divested him of whatever interest he may have had.

The City of Guthrie *vs.* H. C. Beamer, 3 Oklahoma, 652.

A townsite settler cannot maintain an action against a board of townsite trustees appointed under an act of Congress to compel a conveyance to him of property upon which he has made settlement.

The case of McMaster *vs.* The Townsite Trustees tried in Canadian county never went to judgment the court in that case never proceeded further than to make findings of facts in the case, this was not rendering a judgment; findings of fact by a court in a case tried to the court have no more force nor effect than the verdict of a jury, when the case is tried to a jury.

The order made in Kingfisher county did not help matters as the judge had no power or authority to make an order or render judgment in the case when absent from the county, such order was a nullity.

A settler claiming property under the United States townsite laws, before he can maintain an action in the territorial courts to

litigate his claim must make application to the townsite trustees for a deed and if the trustees refuse to convey to him he must appeal and litigate the matter through all the branches of the Interior Department, if he fails to do this he abandons his claim whatever it may be.

By platting Government land as a townsite into lots, blocks, streets and alleys, the streets and alleys designated are dedicated as streets and alleys to public uses and when a municipal cor-
129 poration is afterwards organized covering the territory embraced in such townsite such municipal corporation where no conveyance has been made to it of the streets and alleys does not become invested in the fee of such streets so as to enable one claiming a portion thereof to maintain an action for the title thereto.

130 And afterward, to-wit, June 16, 1903, defendant in error filed in said supreme court his petition for a rehearing of said cause, which petition reads in words and figures as follows, to-wit:

TERRITORY OF OKLAHOMA:

In the Supreme Court.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } No. 1126.

Error from the district court of Oklahoma county, B. F. Burwell, judge, June term, 1903.

Opinion filed June 6.

Now comes the defendant in error herein and petitions the court for a rehearing of the opinion so rendered herein at said term, for this that:

1. Said court in said opinion overlooked the gen. sec. 4452, Civil Proc. 574 Ok. Stat. 1893, p. 858, which especially requires the filing of the appeal or writ of error as filed herein within one year from the date of entry of the judgment or order appealed from.

2. That said court in said opinion overlooked the date of the rendition and entry of the judgment of the district court herein appealed from, and the date of filing the case made herein, to-wit:

Judgment district court entered July 7th, 1900.

Case-made herein filed in supreme court, August 5, 1901.

3. The said sec. of the said statute, when applied to said dates was a ruling and controlling statute.

131 4. This court overlooked in the decision herein the case of Doorley *v.* The Buford & George Manufacturing Co., 59 K. 594, which is a controlling case upon the writ of error herein.

5. The question herein is jurisdictional, *i. e.* Was the appeal taken in time, as by statute required? And was presented by motion and also by the defendant's brief in the argument of this case, but thus far has been undecided although it is shown by the record in said cause that more than one year elapsed between the date of the entry of judgment in the district court and the making of the appeal herein, and said plaintiff in error, appellant herein, having shown no statutory excuse therefore.

Wherefore your petitioner asks that a re-hearing be had as to the question set forth herein and that if the facts be found as herein stated and shown, the writ of error herein be dismissed and a mandate issued and sent to the district court commanding that said court proceed to execute the judgment by it heretofore rendered in said cause.

FRANK McMASTER,
Att'y for Defendant in Error.

Endorsed: No. 1126—Supreme court—Oklahoma City, pl'ff, in error, *vs.* Frank McMaster, def't in error—Petition for rehearing—Filed June 16, 1903, Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

132 And afterward, to-wit, June 26, 1903, said plaintiff in error also filed its petition for a rehearing of said cause, which petition reads in words and figures as follows, to-wit:

UNITED STATES OF AMERICA, *Territory of Oklahoma,* } *ss*:

In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error, *vs.* FRANK McMASTER, Defendant in Error. } Petition for Rehearing.

Now comes the plaintiff in error and for its petition for rehearing says that a rehearing should be granted in the above entitled cause for the following reasons, to-wit:

First. That the question duly submitted by counsel was not correctly decided by the court and in conflict with the law, to-wit: That the judgment of the district court of Canadian county and decided by this court to be good, is absolutely void, and, in fact, no judgment, for the reason that defendant in error's only remedy, when the townsite board refused to issue him a deed, was to appeal to the Commissioner of the General Land Office of the United States, and, until the Land Department of the United States had finally passed on the case, the civil courts of the Territory of Oklahoma had absolutely no jurisdiction of the title to the land.

Second. That the decision is in conflict with the express statute of the Territory of Oklahoma, and of controlling decisions to which the court's attention was not called by the brief or oral argument, to-wit: General section 4729, page 1107, of the Revised Statutes of Oklahoma, (Wilson)

133 "In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial, by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term."

This statute is an exact copy of section — of the Kansas statute, which is as follows:

"In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial, by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term."

The Kansas statute was construed in the case of Cheesebrough *vs.* Parker, 25 Ks. 566, Doster *vs.* Sterling, 33 Ks. 381, and like statutes from the State of Colorado in the case of Equator Company *vs.* Hall, 106 U. S. 86 and from the State of Illinois Mansfield *vs.* Excelsior Refining Company, 135 U. S. 326, have been construed by the United States Supreme Court and have been held to entitle the losing party in an ejectment suit to another trial; that another trial is a matter of right under the Oklahoma statute already cited, and that the case on the first trial in the ejectment suit was not fully presented to the trial court expecting that they would have a right as a matter of law, to another trial.

Third. That the motion for a new trial filed by plaintiff in error stricken from the files should have been considered and not stricken from the files for the reason that it was filed out of time on account of an unavoidable accident in this, that the trial court set aside the judgment and granted a new trial and said order remained in full force and effect until after the time expired required by stat-

134 ute for the filing of motions on general grounds for the filing of a motion for a new trial and no reason existed why a motion on the grounds in ordinary civil cases should have been filed within the statutory time for the reason that the judgment had been set aside and there was no way by which plaintiff in error could know or expect that said judgment would be reinstated and the order vacated granting a new trial; that plaintiff in error had a right to rely on the law under the statutes of Oklahoma Territory and the decisions hereinbefore cited.

Now, therefore plaintiff in error prays that it be granted a re-hearing in the supreme court, of this cause, and that it be permitted to make and present in its brief all of the errors saved in the record.

S. A. McGINNIS,
City Attorney in and for Oklahoma City and Attorney for Plaintiff in Error.

Endorsed: No. 1126—City of Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error—Petition for re-hearing—Filed June 26, 1903—Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

135 And afterward, to-wit, August 18, 1903, said defendant in error filed his affidavit of failure of plaintiff in error to serve petition for rehearing in twenty days, which affidavit reads in words and figures as follows, to-wit:

In the Supreme Court, Oklahoma Territory.

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } No. 1126.

Motion for Rehearing to the June Term, 1903.

Now comes Frank McMaster, defendant in error herein, and being first duly sworn on oath says, that a copy of the petition for rehearing was not served on the defendant in error within twenty days from the time of filing the opinion in said cause, as provided in rule XIX of said supreme court.

FRANK McMASTER
Defendant in Error.

Subscribed and sworn to before me this 17th day of August, 1903.

[SEAL.] T. F. HARWOOD,
Notary Public.

My commission expires March 17, 1906.

Endorsed: No. 1126. Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error—Affidavit of failure of pl'ff in error to serve petition for rehearing in twenty days.—Filed August 18, 1903. Benj. F. Hegler, clerk supreme court.

136 And afterward, to-wit, September 8, 1903, said defendant in error filed his motion to dismiss the petition of plaintiff in error, which said motion reads in words and figures as follows, to-wit:

In the Supreme Court of Oklahoma Territory.

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK McMASTER, Defendant in Error. } No. 1126.

Motion to Dismiss Plaintiff's Petition for Rehearing.

Now comes the defendant in error by Frank McMaster, attorney, and moves the court to dismiss said motion for this:

There is no proof of service of petition for rehearing within twenty days from the time of filing the opinion in said cause.

That the affidavit of Frank McMaster is filed herein showing that a copy of petition for rehearing herein was not served on defendant in error within twenty days from the filing of the opinion in said cause as required by the rules of said court.

Wherefore defendant in error moves the court to dismiss said petition for rehearing as filed herein by said plaintiff in error.

FRANK McMASTER,
Defendant in Error.

Endorsed: No. 1126—Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error—Motion to dismiss plaintiff's petition for rehearing—Filed September 8, 1903, Benj. F. Hegler, clerk supreme court.—Frank McMaster, att'y for def't in error.

137 And afterwards, on the 10th day of September, 1903, at the June, 1903, term of said supreme court, the following proceeding was had in said cause, to-wit:

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK McMASTER, Defendant in Error. } # 1126.

And now this cause comes on for consideration by the court upon the motion for a denial of the rehearing of the same.

And the court having duly considered the same, and being fully advised in the premises, finds: That a rehearing of this cause should be denied, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the petition for a rehearing of this cause be and the same is hereby denied.

138 UNITED STATES OF AMERICA,
Territory of Oklahoma, } *ss*:

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 137 pages, numbered from one to one hundred thirty seven, inclusive, are a true and com-

plete transcript of the record and all proceedings in said supreme court in the case of The City of Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 29th day of October, 1903.

[Seal of Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

139 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } 1126.

Error to district court of Oklahoma county.

Brief of Plaintiff in Error.

John H. Wright, city attorney, and
Selwyn Douglas, attorneys for plaintiff in error.
Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Cert.

140 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

Error to district court of Oklahoma county.

Brief of Plaintiff in Error.

Statement of facts for plaintiff in error.

On the 22nd day of September, 1899, the defendant in error as plaintiff in the district court of Oklahoma county, filed his
141 petition in ejectment containing the averments required by statute, against the plaintiff in error, defendant in the said district court for the recovery of the possession of a certain portion

of Grand avenue, in Oklahoma City, the said Grand avenue being one of the principal streets and thoroughfares of said city.

The said portion of said street so sought to be recovered in said action, is described in said petition as being a piece of land 50 feet by 140 feet, bounded as follows:

Commencing at a point in said city of Oklahoma City, on the southeast corner of block twenty-three (23) being the plat now in use of said city, and running thence southerly on a straight line with the west line of Broadway, as shown by said plat thirty-three and ten one hundredths (33 10-100) feet from the southeast corner of the block aforesaid to the place of beginning, thence west from said place of beginning one hundred and forty (140) feet, thence south at a right angle with the line aforesaid fifty (50) feet, thence east parallel with said east and west line first named, one hundred and forty (140) feet, thence north parallel with said north and south line fifty (50) feet to the place of beginning, and for damages for withholding possession of said parcel of land.

Case-made, pages 2 and 3.

A general demurrer of the city to said petition was by the court overruled, and afterwards on the 24th day of November, 1899, the city filed its answer to said petition, alleging among other things as a defense to said action that the parcel of land sued for is a part of the original townsite of Oklahoma City, and is included in and is a part of Grand avenue, a public highway and street of said city as the same is shown on original plat and survey of said city, which
142 was approved by board No. 2 of townsite trustees of Oklahoma City, on the 6th day of September, 1890, and recorded under and by direction of said board in the office of the register of deeds of Oklahoma county, Territory of Oklahoma, on the 8th day of September, 1890, in Book No. One (1) of plats, of the records of said county, at pages 2 3 and 4 of said book; and that said Grand avenue with the said parcel of ground claimed by said McMaster included therein, was and had been for more than one year prior to the approval of said plat and survey by said townsite board and the filing of said plat so approved in the office of the said register of deeds, and had been at all times thereafter, used and occupied exclusively as a public highway and street of said city by the inhabitants of said city and Territory and was so exclusively used as a public highway long before the organization of said city as a municipal corporation, and that said McMaster was never at any time in possession of said parcel of land and had no interest therein.

See case-made, pages 9 and 10.

Thereafter, on the 5th day of February, 1900, said McMaster filed his reply to said answer denying the allegations of said answer.

See case-made, page 12.

The evidence introduced by defendant in error in the court below consisted, *first*, of the patent of the United States to the townsite,

trustees, *second*, certain findings purporting to have been made by Hon. John H. Burford in the district court of Canadian county on the — day of May, 1892, in an action pending therein where Frank McMaster was plaintiff, and Edgar N. Sweet, Levi E. Coe and David H. Hammons were defendants.

143 See Exhibit B.

Case made, pages 31, 32 and 33.

Third, a certain order made by Hon. John H. Burford, on the 13th day of October, 1893, in the district court of Kingfisher county in some kind of an action therein appearing to be pending in which said Frank McMaster was plaintiff and Edgar N. Sweet, Levi E. Cole and David H. Hammons, townsite trustees' board No. 2 and their successors were defendants.

See case-made, pages 34 and 35.

Fourth, the testimony of John Holzapfel, who testifies to the rental value of said parcel of land, and that said parcel of land is a part of Grand avenue, a street of said Oklahoma City.

Case-made, pages 16, 17, 18 and 19.

Thereupon the defendant in error rested his case in the court below, and the plaintiff in error, the city, demurred to the said evidence introduced by said defendant in error and filed its demurrer to said evidence, which demurrer was overruled by the court, to which order and decision of the court overruling said demurrer to the evidence the defendant city excepted.

Case-made, pages 19, 20, 22, 23.

Thereupon the defendant city offered in evidence by C. J. Bowman, register of deeds, and read, *first*, the final receipt of the local land office to the townsite trustees of said Oklahoma City bearing date of September 3, 1890.

Case-made, pages 23 and 37,

and *second*, the original townsite plat of said city, which
144 was approved by board No. 2 of townsite trustees on the 6th day of September, 1890, and filed in the office of the register of deeds of Oklahoma county, and *third*, the order of the board of county commissioners made on the 15th day of July, 1890, incorporating Oklahoma City as a municipal corporation.

Case-made, pages 24, 37 and plat following, Exhibit F.

Thereupon the city rested its case. The plaintiff, Frank McMaster, who is defendant in error here, then offered to prove by Bunkey's book and by the testimony of Mr. Sidney Clark, certain matters which the court could not do otherwise than to exclude for the reason that it was incompetent and not the best evidence and was in any event wholly immaterial; and plaintiff in error also offered to read in evidence over the objections of the city, a petition for incorporation of said city as shown by Exhibit I, in the record.

Case-made, pages 43 to 50 inclusive.

The above constituted all the evidence in the case, and thereupon the court below rendered judgment in favor of McMaster and against the city, and in the same entry set aside and vacated the same and ordered a second trial of said action and continued said cause to the next term of said court.

Case-made, pages 53 and 54.

Afterwards, on the 21st day of January, 1901, McMaster filed his motion to set aside said order of the court granting a second trial of said cause, supporting his motion by a certain certificate of Hon. William Jenkins, secretary of Oklahoma Territory.

Case-made, pages 56 and 57.

145 And afterwards, on the 11th day of February, 1901, said defendant in error, filed a second motion to set aside said order granting such second trial and to reinstate said judgment.

On the 29th day of April, 1901, the court below sustained the motion to reinstate said judgment, to which order of the court sustaining said motion the defendant city then and there excepted, and thereafter on the same day the city filed a motion for a new trial of said action.

Case-made, pages 61, 63, 64.

Afterwards, on the 1st day of June, 1901, said cause came on to be heard upon said motion of the city for a new trial, and thereupon the defendant in error moved that said motion for new trial be stricken from the files of said court, on the ground that same was not filed within three days after the rendition of said judgment, which said motion or defendant in error, McMaster, to strike said motion for new trial from the files and not consider the same was overruled by the court, to which order the defendant in error excepted, and thereupon said motion of the city for new trial was submitted and argued by counsel, and was by the court overruled, to which order of the court overruling said motion for new trial the said City of Oklahoma City then and there excepted, and thereupon time was allowed to said city as plaintiff in error herein to make a case for the Supreme Court, and the same was accordingly done.

Case-made, pages 66, 67.

Authorities and Argument.

It is admitted that a *final receipt* for the quarter section in which the parcel of land in controversy is situated, and of which
146 it is a part, was issued by the United States local land office at Oklahoma City to townsite board No. 2, on the 3rd day of September, 1890.

It is also admitted that United States patent for said quarter section was afterwards issued, on the 1st day of October, 1890, to said townsite board, for the use of the inhabitants on said land.

It is also admitted that the said townsite board No. 2, on the 6th day of September, 1890, adopted, approved and filed a plat of the quarter section of land described in said patent, as a townsite plat of and for the original townsite of Oklahoma City, and that by such plat the parcel of land claimed by said defendant in error, was thrown into the street, known and designated as Grand avenue in said Oklahoma City.

Case-made, pages 16 and 32.

The defendant in error bases his right to recover possession of the parcel of land in controversy in this section, subject to the foregoing matters, *wholly upon certain findings* made by Hon. John H. Burford, judge of the second judicial district, in a certain action pending in the district court within and for Canadian county, in which said defendant is error, McMaster, was plaintiff, and Edgar N. Sweet, Levi E. Coe and David H. Hammons were defendants, and on a certain alleged judgment or decree, rendered in said last named cause, at Kingfisher, in Kingfisher county, on the motion of said defendant in error on the 13th day of October, 1893.

Case-made, pages 31 to 35 inclusive.

Counsel for plaintiff in error here admit that if said defend-
147 ant in error is and was the owner of said parcel of land according to his contention, then he is entitled to recover damages for the withholding of the possession of said land by plaintiff in error for a period of three years prior to the commencement of this action in the court below, and since, at the rental value of $250 per year as sworn to by John Holzapel.

But defendant in error's right to recover such damages depends of course upon the question of his ownership and right to the possession of said parcel of land. Consequently we shall have nothing further to say concerning said question of damages, but will address ourselves entirely to the question as to whether or not the evidence in the case entitles the defendant in error to recover possession of said parcel of land in controversy.

If the defendant in error is the owner, in law or equity, of said parcel of land, it is because of his settlement thereon and other facts as found by and in the findings of Judga Burford in the case of Defendant in Error *vs.* The Townsite Trustees in Canadian county on or about the — day of May, 1892, and the so-called judgment rendered in said cause at Kingfisher, in Kingfisher county, on the motion of said defendant in error on the 13th day of October, 1893.

These findings and that so-called judgment, taken together, are all the evidence in this case to show that defendant in error ever at any time before the commencement of this suit in the court below, claimed possession or title or any right by original settlement or otherwise, to said parcel of land.

These findings constitute the only evidence in this case that
148 defendant in error was ever at any time in possession of or occupying said parcel of land.

There is not another particle of evidence on that point.

And we respectfully submit with due deference to everybody, including the court below, that, inasmuch as the plaintiff in error was not a party to the proceeding in which those findings were made, such findings were not competent evidence to prove any fact in this case, they were not competent to prove possession or right of possession or title or rights of any kind in favor of defendant in error and against the plaintiff in error.

But suppose we admit for the sake of argument, that such findings were competent evidence in behalf of defendant in error, for any purpose in the trial of this case, what then do we discover from an examination of said findings?

We find, among other things, that prior to the conveyance of the quarter section to the townsite trustees, the parcel of land in controversy had been "thrown into the street called Grand avenue," by the adoption of a plat made by the inhabitants.

We also find that defendant in error applied to the townsite board for a deed to said parcel of land on the 21st day of April, 1891.

Said findings also show, if they could possibly be admitted to prove anything in this case, that said parcel of land had been appropriated and used as a street long prior to the conveyance of the quarter section to the townsite trustees, and that the defendant in error was not an occupant of said parcel of land at the time of said conveyance.

Said findings also show that defendant in error applied to
149 the townsite board for a deed to said parcel of land on the 21st day of April, 1891, over seven months after the townsite board No. 2 had adopted, approved and filed its plat of said city and had, by reason of such approval and filing divested itself of any and all title to said parcel of land.

Said findings also show that said McMaster was not an occupant of said parcel of land at the time the United States conveyed the said quarter section to said townsite trustees, but that the same was then occupied as a street by the inhabitants of said city.

In view of the fact that the adoption, approval and filing of the plat on the 6th day of September, 1890, had divested the townsite trustees of title and that defendant in error was not in possession of said parcel of land at the time nor afterwards, and did not apply to the townsite board for a deed until many months thereafter, it appears to us that townsite board No. 2 were powerless to afford defendant in error any relief in the premises at the time he made his application.

City of Guthrie *vs.* Beamer, 3 Okla. 652.

But we desire at this point to revert to the question of the admissibility of the findings of Judge Burford in the Canadian county district court, as evidence for defendant in error in the case at bar, over the objection of plaintiff in error.

All that the record in this case shows concerning these findings is what appears in the entry of findings themselves.

They purport to have been made in the Canadian county district court in an action in which they are entitled.

Whether they were made in an *ex-parte* proceeding against the townsite board or trustees or whether the townsite board had
150 any notice or knowledge of such proceeding the record fails to disclose.

There being nothing in the record whatever, to show that the townsite trustees were notified of the pendency of such proceeding or had any knowledge of its existence or pendency, we are at a loss to understand how they could have been used in evidence in a case in another jurisdiction even against the townsite board itself.

These findings of Judge Burford did not constitute a judgment against the townsite board nor against anyone else.

They were simply findings upon which perhaps a judgment of some kind might have been entered. But no judgment of any kind was ever entered thereon.

The court below was wholly misled by the notion that the so-called judgment entered at Kingfisher, in Kingfisher county, was made in pursuance to and upon said findings made in Canadian county district court, and that said so-called judgment at Kingfisher was for that reason a valid judgment against the townsite trustees or board.

But the court below was clearly in error.

The record shows that the findings of the Canadian county court were made on or before the 11th day of May, 1892, as shown by the certificate of the clerk of the district court of Canadian county.

Case-made, page 33.

An- the certificate and endorsement of the register of deeds immediately following the district clerk's certificate shows that
151 said findings, with the clerk's certificate thereon, were filed for record in the register's office on the 14th day of May, 1892, three days after the date of the clerk's certificate.

Case-made, page 33.

Therefore the so-called judgment entered in Kingfisher county on the 13th day of October, 1893, cannot have been intended to be entered upon said findings of the Canadian county district court or to supplement such findings, for the reason that said so-called judgment does not in any way refer to said findings made on or prior to May 11, 1892, but do distinctly refer to some kind of a decree entered on the 14th day of November, 1892, just six months after the said findings were filed for record in the office of the register of deeds.

We are therefore perfectly safe in declaring that the so-called judgment of the Kingfisher court is not a part of, and does not supplement the said findings, because the said judgment shows for itself that it is not meant to be supplementary thereto and does not pretend to be founded thereon, but upon some other alleged decree which does not appear in evidence in the record of this case.

But suppose the Kingfisher judgment was intended to be founded upon said findings or to be supplementary thereto.

Is it of any validity?

We will not cite authorities upon the question whether a judgment rendered in one county upon a case pending in another county, can be valid, unless the parties to the same are shown to have agreed to it in advance.

Of course it is invalid. It is void from the first. It is precisely as if it had never been made.

Even if it had referred to the findings of the Canadian
152 county district court, it would be absolutely void for the reason that it was not rendered in Canadian county.

As to the findings themselves: Is there anything in the record, any evidence whatever, to show what kind of a judgment the district court of Canadian county would have rendered thereon, if it has ever attempted to render one?

It seems unnecessary for us to insist on the fact or to recite that the so-called judgment rendered in Kingfisher county is void, void *ab initio*, and we would not do so except for the very serious effect it appeared to have on the mind of the court below. It would certainly seem that a judgment rendered in Kingfisher county in a case pending in Canadian county ought not to be seriously considered for any purpose, unless there was something in the record to show that the parties against whom it was rendered had consented to it, or, at least, knew that something of the kind was intended. Especially is this the case when such judgment is not based upon findings of some kind.

A judgment to be valid for any purpose, must be based upon a finding of some kind.

It must have been a verdict of a jury or the findings of the court to support it, or it is erroneous and void.

McKeon *vs.* McDermott, 22 Calif. 667.
Wiley *vs.* Lovely, 46 Mich. 83.
Merc. at. Bank *vs.* Pope, 19 Oreg. 35.
Bates *vs.* Bower, 17 Mo. 550.
Haxton *vs.* McCloven, 132 Ind. 235.
Stansill *vs.* Corning, 21 Mich. 242.
Stahl *vs.* Gotzenberger, 45 Wis. 121.

153 But the Kingfisher judgment is void in any event. It was rendered in a county in a case not pending in that county.

But the findings of Judge Burford in the district court of Canadian county were not competent to establish any fact against the plaintiff in error.

They might be competent evidence in a case against the townsite trustees who were parties to the suit in Canadian county, but not against any other person, municipality, or party not connected with the suit, nor in any way privy to it. In order to make them binding upon the plaintiff in error, the latter should have been made a party to the suit in which the findings were made.

Any other rule would be productive of injustice and probably of the grossest fraud upon innocent parties.

Neither the court below nor the writers of this brief would care to submit a decision in a case where our dearest rights might be annulled in a case we knew nothing about in which the defendant in error or any other man was plaintiff and Edgar N. Sweet or some other person was defendant.

The plaintiff in error is and was wholly a stranger to the proceedings in Canadian county and was and is an entire stranger to the findings or to any judgment that might have been rendered therein.

This is the rule, and it is universal in its application, that all who are not parties to a judgment nor privies to the parties thereto, are wholly free from the estoppel of the judgment, and as one of our greater text writers on the subject says, "*it is a canon of general jurisprudence.*"

154 Black on Judgments, vol. 2, sec. 600, page 717.
See the numerous cases cited in Black under above section.
See, particularly, Foster *vs.* Powers, 64 Texas, 247.

In discussing this principle, that judgments do not bind strangers, Mr. Black says:

"That the rule is firmly imbedded in our laws is attested by a "multitude of cases."

"It was said in the leading case on this subject: "What has been "said at the bar is certainly true as a general principle, that a trans- "action between the parties in a judicial proceeding, ought not to "be binding upon a third party; for it would be unjust to bind any "person who could not be admitted to make a defense or to examine "witnesses, or to appeal from a judgment he might think erroneous; "and, therefore, the depositions of witnesses in another case in proof "of a fact, *the verdict of a jury finding the fact, and the judgment of the "court upon the facts found*, although evidence against the parties and "all claiming under them, are not in general to be used to the preju- "dice of strangers."

Kingston's case, 2 Smith Lead. Cas. 424.

Mr. Black continues: "And in another case, 'It contravenes the "first principle of justice, to hold a man bound by a judgment against "which he has neither an opportunity to defend, or notice in any "way that he was to be directly involved in its consequences.'"

Morrison *vs.* Mullin, 34 Pa. St. 12.

He also quotes with approval the language of the court in
155 the case in 64 Texas, above cited: "No person can be di- "vested of title to his property in a suit between other par- "ties of which he has no legal notice, and *a judgment rendered in "such a suit is not binding upon him*, and *is not admissible in evidence "against him in any future proceeding in which the title to the property "is in controversy.*"

Foster *vs.* Powers, 64 Texas 247.

He continues, "*The same rule holds good in chancery as well as at law.*"

But we insist that the so-called judgment entered in "open court at Kingfisher," in the district court of Kingfisher county, even if intended to be based upon the "findings" of the court in Canadian county, (which is clearly not the case) is not a judgment at all.

It is absolutely and irredeemably void and of no effect. It is void upon its face. It professes upon its face to be a judgment rendered in Kingfisher county in a suit then pending in Canadian county.

It must have been admitted in evidence in the case at bar upon the theory that it supplemented in some mysterious way, or attached to the "findings" of the district court of Canadian county.

But of course it did nothing of the kind. It was absolutely void because the court had no power, jurisdiction or authority to render any judgment in "open court at Kingfisher in Kingfisher county," in a case not pending in that county.

Certainly the court below was in error, in admitting the "findings" made in the Canadian county district court as evidence against the plaintiff in error, unless there was something in the record to show (1) that the plaintiff in error was a party or privy to
156 the case in which the findings were made, and (2) that the said findings had been supplemented and carried into judicial effect by a proper judgment rendered therein.

The findings of a court in a case tried by the court, are equivalent to a verdict of a jury in a case tried by such jury.

But the findings of a court are not a *judgment*, any more than the verdict of a jury is a *judgment*.

Neither the verdict of a jury nor the findings of a court, without a judgment entered thereon, is of any validity either as a matter of estoppel or as evidence.

It is not of itself even a bar to another suit on the same cause of action.

Dunlap *vs.* Robinson, 12 Ohio St. 530.
Benson *vs.* Post, 9 N. W. 684.
Estate of Holbert, 57 Calif. 257.
Smith *vs.* McCool, 16 Wallace, 560. (U. S.)
Auld *vs.* Smith, 23 Kas. 65.

In the Kansas case of Auld *vs.* Smith, above cited, the court says: "Final judgments are of course adjudications, and findings of courts "and verdicts of juries and reports of referees may also sometimes "be considered as adjudications, but they can be considered such "only in cases where they, themselves, are *final*, or in cases where a "final judgment has afterwards been rendered upon them sustaining and confirming them."

Freeman on Judgments, sec. 251.

And we beg to call attention to the fact that these findings were made by the district court of Canadian county over nine years ago, and it is perhaps somewhat doubtful whether a valid judgment could

be rendered upon them at this time. But this would become
157 pertinent only in case of a suit brought after rendition of such a judgment.

At any rate it is clear that no valid judgment *has been rendered* upon the findings, and therefore they could not be admitted in evidence, not even in a suit against the townsite board No. 2 itself. How, then, can they be competent as evidence against the plaintiff in error in the case at bar?

But if these findings had been supported and followed by a regular and valid judgment thereon, such findings and judgment would not affect the rights of plaintiff in error which had obtained an absolute dedication of the parcel of land in controversy by virtue of the plat of the townsite adopted, approved and filed by the townsite board No. 2 on the 6th day of September, 1890, long before the commencement of the suit in which said findings were made.

We submit, therefore, that the findings of the district court of Canadian county, unsupported or followed by a valid judgment, were and are not competent evidence against the plantiff in error. That the so-called judgment rendered at Kingfisher, in Kingfisher county, was and is void upon its face, and was and is not competent evidence against the plaintiff in error.

That as said findings and so-called judgment constituted the only evidence in support of the petition of defendant in error, and all the evidence offered by him in the case, the demurrer of plaintiff in error to the evidence offered by defendant in error ought to have been sustained.

We further submit, if said evidence of defendant in error had been competent, that the fact that the plat of the townsite was adopted and approved on the 6th day of September, 1890, by the
158 townsite trustees, divested said trustees of title to said parcel of land, and defeats the right of defendant in error to recover in this action.

But the certainty that the findings of the court in Canadian county are not supported or followed by any valid judgment makes such findings incompetent as evidence in this case.

As these findings and said so-called judgment of the court in Kingfisher county are all the evidence that supports the judgment of the court below in this case it follows that the judgment must be reversed and a judgment rendered for plaintiff in error by this court.

Respectfully,

JOHN H. WRIGHT,
City Attorney, and
SELWYN DOUGLAS,
Attorneys for Plaintiff in Error.

Endorsed on cover: File No. 19,127. Oklahoma Territory supreme court. Term No. 137. The City of Oklahoma City, plaintiff in error, *vs.* Frank McMaster. Filed November 6th, 1903. File No. 19,127.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1904.

CITY OF OKLAHOMA CITY,
Plaintiff in Error
VS.
FRANK McMASTER,
Defendant in Error.

No. 137.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

ANSWER TO MOTION TO DISMISS AND AFFIRM, AND BRIEF IN SUPPORT THEREOF, AND ALTERNATIVE MOTION TO SUPPLY STATEMENT OF FACTS.

STATEMENT OF FACTS OF THE CASE.

S. A. McGinnis, City Attorney,
C. Porter Johnson, Frank Dale
and A. G. C. Bierer,
Counsel for Plaintiff in Error

THE STATE CAPITAL CO., GUTHRIE, OKLAHOMA.

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STATEMENT OF FACTS OF THE CASE.

This is an action brought in the District Court of Oklahoma County, Oklahoma Territory, by Frank McMaster against the City of Oklahoma City in ejectment, to recover a parcel of land. (page 21.) The City first demurred to plaintiff's petition (page 22), then answered (page 23), admitting

the corporate existence of the defendant and setting up that the land described is a part of the original townsite of the City of Oklahoma City, and a street and highway thereof, as the same appeared by the original plat and survey of the city, approved by the Board of Townsite Trustees of Oklahoma City, and had been such for more than a year before the approval of the plat.

To this answer reply was made by McMaster, which reply denied the averrments therein which contradicted the allegations of plaintiff's petition, but did not deny the allegations that this land was and had been for the time given a part of the streets of Oklahoma City.

On the trial of the case in the District Court of Oklahoma County, the only evidence of title offered by plaintiff was the patent issued by the President of the United States to the Townsite Trustees, and certain findings of fact made by Judge Burford in the case of Frank McMaster against the Townsite Trustees pending in the District Court of Canadian County, and a certain order made thereon by Judge Burford in the same case while holding Court in Kingfisher County. (See pages 34 to 38). Judgment was rendered in the case for the plaintiff, and after some other proceedings, appeal taken to the Supreme Court of the Territory.

The District Court rendered only a general judgment, and made no findings of fact or conclusions of law, but simply found, ordered adjudged and decreed that plaintiff was the legal and equitable owner of the property sued for, and rendered judgment also for damages, the damages being based of course on the decree of plaintiff's title. (page 47).

The Supreme Court passed upon the case in a clear, specific and elaborate manner, and made a statement of facts of the case and conclusions of law which are contained in the following statement of the case and opinion of the Court, and dissenting opinion by Justice Pancoast, which appears on pages 58 to 72 inclusive, as follows:—

In the Supreme Court of the Territory of Oklahoma, June Term, 1903.

Filed June 6, 1903.

THE CITY OF OKLAHOMA CITY,

Plaintiff in Error,

vs. No. 1126.

FRANK MCMASTER, Defendant in Error.

SYLLABUS.

1. Where errors are assigned in the petition in error, but are not mentioned in the argument or brief of counsel, and are not relied upon in the argument or brief for a reversal of the judgment complained of, they will be deemed waived and abandoned, and will not be regarded in this court.

2. Where an occupying claimant has entered upon public lands which are open to settlement, and has made settlement thereon, for homestead purposes, and has legal vested rights therein, such rights cannot be taken from him for public use, except by due process of law, and the payment of just and reasonable compensation therefor.

Error from the district court of Oklahoma county.

B. F. Burwell, trial judge.

Affirmed.

Appearances: Jno. H. Wright and Douglas and Douglas, for plaintiff in error. Cotteral and Horner, and Frank McMaster for defendant in error.

STATEMENT OF THE CASE.

This is an action brought by the defendant in error, Frank McMaster, against the plaintiff in error, the City of Oklahoma City, in the district court of Oklohoma county, on the 22nd day of September, 1899, for the recovery of the possession of two certain lots, towit, lots numbers one and two of block number twenty-four of the original plat of said city, as filed in the United States Land Office, to recover the possession of said lots, and damages for the wrongful detention thereof. The original petition in said case is in words and figures as follows:

"TERRITORY OF OKLAHOMA, }
Oklahoma County. }

In the District Court, 3d District.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant.

PETITION.

Now comes the plaintiff herein complaining and says:

1st. That the defendant is a municipal corporation of Oklahoma Territory, being a city of the first class, and located in Oklahoma county, aforesaid.

2nd. That the plaintiff is the legal and equitable owner of the real estate herein described, and fully entitled to the possession thereof, and of which the defendant unlawfully keeps him out of the possession, being a part of the southeast quarter (¼) section thirty-three (33) town 12, north range 3 west in said county, and Territory more particularly described as follows: Commencing at

a point in said city on the southeast corner of block twenty-three (23), as shown by the trustees' plat, being the plat now in use in said city, and running thence southerly on a straight line, with the west line of Broadway street, as shown by said plat, thirty-three and ten one hundreds (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning, one hundred and forty feet (140), thence south at a right angle with the line aforesaid' fifty (50) feet, thence east parallel with said east and west line, first named one hundred and forty feet (140), thence north parallel with said north and south line, fifty (50) feet to the place of beginning.

3rd. That prior to the filing hereof being far more than four weeks thereto, plaintiff presented his claim to defendant for uses, rents and profits thereon, as well as a demand for possession of said real estate, described as aforesaid, but that the defendant refused to pay said claim, and still retains possession of said real estate, to the damage of plaintiff in the sum of two hundred and fifty (250.00) dollars, per year, since the 14th day of November, 1892.

4th. Said real estate is further described on the Dick plat, being the original plat of said city, as lots Nos. one (1) and two (2) of block No. twenty-four (24) of said plat, as filed in the U. S. Land Office.

Wherefore the plaintiff prays judgment herein against defendant:

1st. For the recovery of said real estate, and damages for withholding the possession thereof.

2nd. For other and further relief.

FRANK McMASTER, Plaintiff.

H. H. HOWARD, Attorney.

No. 2053. Frank McMaster vs. Oklahoma City. Amended petition. Filed Sept. 22, 1899. B. D. Shear, clerk. H. H. Howard, att'y.

To said petition the defendant, on the 10th day of October, 1899, filed its demurrer, in words and figures as follows, to-wit:

"TERRITORY OF OKLAHOMA, } ss.
County of Oklahoma. }

In the District Court.

FRANK MCMASTER, Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, Defendant.

DEMURRER.

Comes now the defendant, The City of Oklahoma City, and demurrs to the petition of the plaintiff filed on the 22nd day of September, 1899, and for cause and grounds of said demurrer, says: That said petition does not state facts sufficient to constitute a cause of action in favor of plaintiff, and against said defendant.

THE CITY OF OKLAHOMA CITY,
Defendant.

By JOHN WRIGHT AND
DOUGLAS AND DOUGLAS, Its Attorneys.

No. 2053. Frank McMaster, plaintiff, vs. The City of Oklahoma City, defendant. Demurrer. Filed in the District Court of Oklahoma County, O. T. October 10, 1899. B. D. Shear, clerk, by M. McKinley, deputy. Re-filed by leave of court, Nov. 20, 1899. B. D. Shear, clerk.

Which demurrer was by the court overruled, to which the defendant excepted.

That thereafter on the 24th day of November, 1899, the defendant filed its answer in said cause, which is in words and figures as follows, to-wit:

TERRITORY OF OKLAHOMA, }
County of Oklahoma, } ss.

In the District Court.

FRANK MCMASTER, Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, Defendant.

ANSWER.

1. Now comes the said defendant, The City of Oklahoma City, and for answer to the petition of said plaintiff in said cause, on the 22nd day of September, 1899, denies each and every allegation and averment therein contained, except such as hereinafter expressly admitted.

The said defendant admits that it is a municipal corporation and city of the first class, as alleged in said plaintiff's petition.

2. The defendant further answering says that the tract and parcel of land claimed by said plaintiff and described in said plaintiff's said petition, is a part of the original townsite of the city of Oklahoma City, in the Territory of Oklahoma, and is situated and is included in and is a part of Grand avenue, a public highway and street of said city, as the same appears upon the original plat and survey of said city, which said plat and survey was approved by said board No. 2, of townsite trustees of Oklahoma City, on the 6th day of September, 1890, and recorded under and by the direction of said board, in the office of the register of deeds of Oklahoma county, Territory of Oklahoma, on the 8th day of September, 1890, in Book No. One of plats of the records of said county, at pages two, three and four of said book.

That said public highway in said city, to-wit, said Grand avenue, with the said land claimed by

plaintiff included therein, was and had been for more than one year prior to the approval of said plat and survey, by said board No. 2 of townsite trustees, and the filing of said plat so approved, in the office of the register of deeds of Oklahoma county, as aforesaid, and has been at all times since, used and occupied exclusively as a public highway, and a street of said city by the inhabitants of said city and Territory, at all times, and was so exclusively used as a public highway and street long before the organization of said city as a municipal corporation, and that said plaintiff was not during any time in possession of said parcel of land, now claimed by him, and had no interest therein.

Wherefore defendant prays judgment for its costs herein against said plaintiff.

THE CITY OF OKLAHOMA CITY,
Defendant,
By JOHN H. WRIGHT, City Attorney, and
DOUGLAS AND DOUGLAS, Its Attorneys.

No. 2053. Frank McMaster, plaintiff, vs. The City of Oklahoma City, defendant. Answer. Filed in District Court, Oklahoma County, O. T., Nov. 24, 1899. B. D. Shear, clerk, by M. McKinley, deputy.

And on the 5th day of Feb. 1900, the plaintiff filed his reply, in words and figures as follows:

TERRITORY OF OKLAHOMA, } ss.
Oklahoma County, }

In the District Court.

FRANK MCMASTER, Plaintiff,
vs. No. 2053.
THE CITY OF OKLAHOMA CITY, Defendant.

REPLICATION.

Now comes plaintiff, for replication to the answer filed herein, says:

He denies each and every allegation of said answer, and every and all of the averments therein, which contradict the averments, counts and allegations of the plaintiff's petition filed herein.

Wherefore, he, the plaintiff, prays judgment as asked in said petition.

FRANK McMASTER, Plaintiff.
H. H. HOWARD, Att'y for Plaintiff.

No. 2052. Replication. Frank McMaster vs. Oklahoma City. Replication. Filed in District Court, Oklahoma County, O. T., Feb. 5th, 1900. H. H. Howard, attorney. B. D. Shear, clerk, by M. McKinley, deputy.

And on the fifteenth day of February, 1900, at a regular term of the district court of the third judicial district held in and for Oklahoma county, in the Territory of Oklahoma, the said cause came on for trial before the Hon. B. F. Burwell, presiding judge, jury having been waived, and the plaintiff introduced in evidence patent from the United States Government to the townsite trustees. Objected to. Overruled. Exception. Plaintiff then introduces judgment rendered in the case of McMaster vs. The Townsite Trustees, by Justice John H. Burford, on the 14th day of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office, in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception.

Plaintiff then offers in evidence a further order of the district judge, Burford, in the same case, dated October 13th, 1893, with a certificate of the register of deeds of Oklahoma county, showing that the same had been recorded in his office. Objected to. Overruled. Exception. Witnesses are then sworn and testify as to the rental values. Here the plaintiff rests. Defendant demurs to the evidence. Whereupon, attorney for the plaintiff, by leave of the court, introduces as further evidence in the case; the journal and the order made by the court in case No. 278, of the district court of Oklahoma county, entitled Frank McMaster vs. Edgar N. Sweet, Levi E. Coe and David H. Hammons, townsite trustees. Said order and journal granting a change of venue in said cause. And thereafter the said defendant refiles its demurrer to the evidence of the plaintiff; which demurrer is overruled, and exception. The defendant introduces testimony to show the final receipt of the local land office to the townsite trustees. No objection, same is admitted and read in evidence. The defendant then offers in evidence a plat of the city, approved by the board of townsite trustees No. 2. Objection, overruled. Exception.

The defendants proves by the register of deeds that the plat is one of the plats of record in the office of the register of deeds of this county. The defendant offers in evidence entries of the county commissioners' proceedings, in Book One, page 11-12 and 13. Objection. Overruled. Exception.

Here the defendant rests. Whereupon the court rendered judgment in favor of the plaintiff for the recovery of the possession of said real estate together with damages for the wrongful detention thereof, in the sum of two hundred and fifty

dollars per year, for the three years prior to the commencement of this action up to the execution of this judgment, and against the defendant for costs. To which order and judgment of the court the defendant then and there excepted.

Whereupon the defendant, by notice on the journal of said court, demanded a second trial, which demand is granted, and said judgment is set aside and vacated, and said cause is continued until the next term of this court.

Thereafter, on the 21st day of January, 1901, plaintiff filed a motion to set aside the order granting a new trial as a matter of right, on the ground that said notice, and the proceedings thereunder are wholly void, without right or authority, and asking that the court reinstate the judgment in said cause, on the 7th day of July, 1900, in favor of the plaintiff, which motion the court sustains, to which the defendant then and there excepts. On the same day the defendant files its motion asking the court for a new trial in said cause, on statutory grounds; plaintiff moves that said motion for a new trial be stricken from the files, for the reason that the same is not filed within the three days' time required by law, after the rendition of judgment, in said cause, which said motion was, upon the consideration of the court, overruled, to which the plaintiff excepts. Whereupon said motion for a new trial in said cause was duly submitted and argued by counsel for plaintiff and defendant, and overruled, to which ruling the defendant excepts, and brings the cause here for review.

Opinion of the court by IRWIN, J.:

The assignments of error in this case may be condensed into three, viz: First, overruling the demurrer of defendant to plaintiff's petition. Second, error of the court in setting aside the order of the court made granting a new trial to the defendant, as a matter of course, without showing cause, entered in the journal, and the reinstating of the judgment in favor of plaintiff; and third, error of the court in rendering judgment in favor of the plaintiff, instead of the defendant.

While the assignments of error made by the plaintiff in error are more numerous than these, we think these three assignments include all of those assigned by the plaintiff in error. Plaintiff in error makes eight assignments of error, but his second and third, it seems to us are included in the first assignment of error as herein set forth. The fourth assignment of error charges that the court erred in admitting as evidence against said plaintiff in error, and over its objection, a copy of a certain pretended judgment of the district court of Canadian county, rendered in an action in said last named court, in which the defendant in error was plaintiff, and the townsite trustees were defendants; and fifth, the court erred in admitting over the objection of the plaintiff in error, a copy of a certain order or judgment of the said district court of Canadian county, made at Kingfisher county, on the 13th day of October, 1893, in an action between the said parties. The sixth and seventh assignments of error are simply general assignments of error in admitting improper evidence on the part of plaintiff, and the eighth, that said district court erred in rendering judgment in favor of defendant in error, instead of plaintiff in error. We think all

the fourth, fifth, sixth and seventh assignments of error can be considered in the eighth, to-wit, that the court erred in rendering judgment in favor of the plaintiff.

The first and second assignments of error as herein set forth it will not be necessary for this court to pass upon, because by the long and established and well settled rule of this court, founded upon the adjudication of many of the supreme courts of other States and Territories, on the same question, these assignments of error have been abandoned by the plaintiff in error. It is a well settled rule of this court that where error is assigned, and the attor- ney for the plaintiff in error fails to insist upon and argue the same in his brief, this court will treat such assignment of error as having been abandoned.

In the case of Gardenhire vs. Gardenhire, 2 Okla. 484, this court says:

"Where errors are assigned in the petition in error but are not mentioned in the argument or brief of counsel and are not relied upon in the argument or brief for the reversal of the judgment complained of, they will be deemed waived and abandoned and will not be regarded by the Supreme Court."

In Peters vs. The United States, 2 Okla. 136, this court in an opinion rendered by the present Chief Justice, says:

"A number of other rulings of the trial court are complained of and errors assigned calling in question their correctness, but as they are not discussed in appellant's brief, they must be taken as waived and abandoned, and we shall not give them consideration."

In the case of Hurst vs. Sawyer, 3 Okla. 296, this court says:

"An assignment of error, which is not relied upon in the brief of counsel for a reversal of the case, will not be considered by this court, nor will this court review a question partially discussed, when counsel, in closing his brief, chooses to abandon it, and rely entirely upon another proposition, and when counsel on the other side have relied upon such withdrawal."

In Provin vs. Lovi, 6th Okla. 94, the court says:

"Where an error is assigned and not presented and argued in the brief of counsel for appellant, and no authorities are cited in support of the contention and counsel for plaintiff treat the question as abandoned, this court will not review the same."

In Penny vs. Fellner, 6th Okla. 386, the court says:

"This court will not examine the record filed herein, in search of prejudicial errors which are not clearly pointed out and insisted upon in the brief of the complaining party, but all such errors (if any) will be considered as waived."

In Huntley vs. The Territory, 7th Okla, 60, this court says:

"Numerous other errors are assigned in the petition in error. We have considered all that have been presented in the briefs, or argued by counsel for plaintiff in error. Under the settled rule of this court such assignments of error as are not presented and relied upon in the argument or brief of counsel are deemed waived and abandoned, and will not be considered by this court."

This doctrine has been repeatedly followed and often sanctioned by the Kansas supreme court. In the case of Topeka Primary Association vs. Martin, 39 Kans. 750, the court there holds:

"That errors not specifically pointed out and relied on in the brief of counsel, will not be considered."

In the case of Wilson vs. Fuller, 9th Kansas, 176, the court say:

"Where errors are assigned in the petition in error, but no reference is afterwards made to them, either by oral argument or in the brief of counsel for plaintiff in error, the supreme court will take no notice of them."

In School District vs. Foster, 11 Kans, 447, it is said:

"Other errors were assigned in the petition in error, but as they have not since been referred to, in the brief of counsel or otherwise, we suppose they have been abandoned, and we shall therefore take no notice of them."

In Davis vs. Filmore, 15, Kans. 333, the court holds:

"Where error is assigned but not briefed, it must be presumed to have been waived and abandoned."

In Campbell vs. Phillips, 28th Kans. 754, the court says:

"Of course our inquiry will be limited to the single matter counsel discuss in their brief."

In Bailey vs Dodge, 28 Kans. 72, it is held:

"Where errors are assigned but not insisted upon in the brief of counsel, the supreme court will not consider them."

In the State of Kansas vs. Stewart, 84 Kans. 250, the court, speaking by Justice Brewer, says:

"Ordinarily this court will consider only such questions as are specifically pointed out and discussed by counsel, and will not search through the record for the sake of finding errors."

This same doctrine is held in Howard vs. Cobb, 6th Ind. 5, and in Robinson vs Tipton, 31 Ala. 595.

Hence we take it that this rule is too well established, and has too long been followed by this

and other courts to now be disturbed, and as we have carefully and repeatedly searched the brief of plaintiff in error, and do not find as to the first or second assignment of error, the slightest reference, not a word nor a line thereon is contained in such argument, nor are any authorities cited; hence, following the rule, we are constrained to treat these two assignments or error as abandoned, and only notice the other assignments of error, which, in our judgment can very properly be considered in the one assignment of error which charges error of the district court in the judgment rendered.

The evidence in this case shows that the lots in controversy were a part of a tract of land conveyed by the United States to certain trustees for townsite purposes, as shown by the patent in evidence.

By this conveyance the land was to be held in trust by said trustees, for the occupying claimants, and such trustees were made agent for such claimants, and such lands were also held in trust *sub modo* for the Government until the rightful claimants could be established, and the manner of disposing of the surplus land ascertained. This land by the act of Congress was open for legal settlement on the 22d day of April, 1889. The defendant in error, in his petition herein, claims that he had on the day that such land was opened for settlement, and not before, legally entered such lots, and went into possession thereof as an occupying claimant, and that under the rules and regulations of the land office he was entitled to a deed at the hands of the townsite trustees. Now the first question to be settled in this controversy is: Was the defendant in error an occupying claimant, such as is recognized by the land laws of the United

States, and entitled to a deed at the hands of the townsite trustees? If this position is correct then under the laws regulating the granting of this tract to the townsite trustees, they held that portion of the same on which he was an occupying claimant, in trust for him. The Government by the conveyance by patent vested the title of this land in the trustees, for the express purpose of having the title conveyed to those who were entitled to claim as occupying claimants. To prove this possession, the defendant in error offered in the court below certain findings of the district court of Canadian County, Oklahoma Territory, which he claims amount to a judgment in his favor, in a certain case therein pending wherein he was the plaintiff and the townsite trustees were the defendants, said cause having been taken to Canadian county on a change of venue, from the district court of Oklahoma county, where said land is situated, and where said trustees resided.

The objection to the introduction of this judgment, of Canadian county, was that the plaintiff in error here, The City of Oklahoma City, was not a party to that record, and consequently not bound thereby; but it seems to us that as the townsite trustees, by the patent had conveyed to them the land, and by the law under which they acted was made the agent not only of all the occupying claimants, but also of the government, and held the land in trust for such claimants, that any and all persons claiming title to any portion of such land, must claim the same through the townsite trustees; that the plaintiff in error here, if any title whatever it had, must have derived the same from a common source of title, to-wit, the townsite trustees, and as such grantee of the townsite trustees

would be bound by any judgment legally rendered against such trustees.

In the case of Caldwell vs. Colorado Springs, 100 U. S. 55, it was held:—

"That as all had a right to appear, it bound all parties. The trustees represent all rights, and their action bound all claimants."

In Kennison vs. Stewart, 93 U. S. 84, it was held:

"That all beneficiaries, although not parties, are bound by judgments against trustees, unless such judgment is impeached for fraud or collusion."

The second objection urged by plaintiff in error herein to the introduction of this judgment of the district court of Canadian county in the court below, was that the findings do not amount to a judgment. What is a judgment? We think it is a final conclusion by a court of competent jurisdiction of a question of law or fact, at issue between the parties thereto, and properly submitted for adjudication. Now in this case the proper parties were before the court, to-wit: the defendant in error, who claimed the right to a deed, and the townsite trustees, in whom the government had vested the title, for the purpose of ascertaining who the legal occupying claimants were, and who was entitled to deeds for the various tracts of land embodied in the patent.

Now as the court found the facts and decided the question submitted to it, and as no question of jurisdiction was there raised, and as no question of jurisdiction is raised in the district court in this case, or in this court, on appeal, and as no appeal was taken from the findings and judgment of the district court of Canadian county, we think the

presumption obtains that the court had jurisdiction of the subject-matter and of the parties, and that the necessary preliminary steps to give the court jurisdiction had been complied with; this being true, we are at a loss to see why the finding of that court as to the facts therein submitted were not binding and conclusive upon not only the parties, but all persons claiming title under or through them. Now what did the district court of Canadian county find as to the facts? By a reference to the copy of the records of that court as shown in Exhibit A, of the case made herein, it will be seen that that court there found that the defendants in that case, Edgar N. Sweet, Levi E. Coe and David H. Hammons, were trustees of the townsite of Oklahoma City, in said county, for the benefit of the actual occupants thereof, under the act of Congress approved May 14th, 1890. That said tract of land described in said patent to said trustees, was on the 22nd day of April, 1889, opened to settlement under the act of Congress approved March 2nd, 1889. That such tract of land was settled upon and occupied as a townsite shortly after noon of said day, and has continued to be and was at the time of said finding still held and occupied. The court further finds that on said 22d day of April, 1889, the people then occupying said townsite had platted said tract of land into lots, blocks, streets and alleys, and the court further finds that the plaintiff there (that is the defendant in error herein) on said day, to-wit: the 22nd day of April, 1889, legally entered upon and occupied the particular piece or parcel of ground in controversy in this suit, and has continued to claim the same, that said piece or parcel of ground at that time was lots one and two in block twenty-four according to the plat. The court finds

that subsequent to such occupancy, and prior to the conveyance to said trustees, a different plat and arrangement of the streets, alleys, lots and blocks, was adopted and enforced by the parties occupying said townsite; that by said change of the plat the land claimed by the plaintiff was thrown into the street in Grand avenue, and the court finds that the plaintiff did not consent, but objected to said second plat, and has never consented thereto or acquiesced therein. That thereafter the plaintiff in that case (defendant in error here) was forcibly removed from said parcel of ground, and has since that time been forcibly kept from the occupancy of said ground. That on the 21st day of April, 1891, the plaintiff applied to said defendants as said trustees, for a deed to said lots, that said trustees found the facts substantially as above stated, but declined to issue a deed therefor, and the court further finds that said City of Oklahoma City has appropriated said lots to its own purposes as a street, and had appropriated the same prior to the conveyance of said tract by the United States to said trustees: the court further finds that said plaintiff was not occupying said tract of ground at the time the United States conveyed the same to the defendants as trustees, but said portion of said tract was at the time used and treated as a street of said city.

Now this finding of the court shows that at the time that this land was opened for settlement under the act of Congress the defendant in error herein had legally entered upon said tract of land, and was occupying it in accordance with the rules and regulations of the Land Department. That being true we take it that his interest and rights in said land attached at that time. That when he

had complied with the rules and regulations of the Land Department, he was entitled to a deed. That he had a vested interest in these lots, and that any other occupying claimant, or any number of occupying claimants, who made up the townsite, at that time or subsequent, had no right to so change the plat as to take from him his interests in said lots, and put them into a public street or highway without his consent. Such a proceeding would be in violation of the constitution of the United States, and would be taking private property for public use, without compensation. The townsite trustees would have no right to deprive him of any property that he might have by virtue of his prior settlement, in these lots, and devote it to street purposes, without his consent and without compensation. His rights must be determined, it seems to us, by the conditions as they existed at the time of his settlement upon these lots, which, according to the findings of the district court of Canadian county, was on April 22nd, 1889. If at that time he had complied with the law, and the rules of the Land Department, and was entitled to a deed, then no subsequent action of the occupying claimants, of the townsite, or the townsite trustees, or the city of Oklahoma City, could take away his rights without his consent, except upon some legal proceeding, and for adequate compensation.

In the case of Sturr vs. Beck, reported in the 133 U. S. at page 545, the Supreme Court of the United States say:

"* * * Any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws shall be allowed the same time

to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws, the ruling of the Land Department has been that if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement."

In Witherspoon vs. Duncan, 4th Wall. 210-218, it is said:

"* * * In no just sense can lands be said to be public lands after they have been entered at the land office, and a certificate of entry obtained. If public lands before the entry, after it they are private property. * * *"

In the decision in the case of Sturr vs. Beck, supra, the court says:

"* * * And as to mere settlement with the intention of obtaining title under the preemption laws, while it has been held that no vested tight in the land as agaiust the United States is acquired, until all the prerequisites for the acquisition of title have been complied with, yet rights in parties as against each other were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. 'The patent, which is afterwards issued, relates back to the date of the initiatory act, and cuts off all intervening claimants.'"

In Burlington K. and S. W. R. Co. vs. Johnson, 16 Pac. 125, the supreme court of Kansas say:

"A settler on the public lands of the United States who makes a valid homestead entry, and continues to reside on and improve the land entered,

in compliance with the land laws, has the exclusive right to its possession and use, and to the improvements made thereon, and he also acquires equities in the land itself, which increase from the time the entry is made until the complete title is earned.

"Such a settler may sell and transfer a portion of his homestead for a right of way for a railroad, or his interest therein may be condemned and appropriated for such purpose upon adversary proceedings, and by paying full compensation to the settler therefor.

"A homesteader who has entered, and is proceeding lawfully to perfect his title to the land entered suffers an injury by the building of a railroad over his homestead which differs only in degree from that sustained from the same cause by one who has the complete title."

Section 2339 of the Revised Statutes of the United States provides:

"Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

But it may be contended that the defendant in error was not in the possession of said lots, and has abandoned the same, but a reference to the finding of fact by the district court of Canadian county will show:

"That thereafter the plaintiff was forcibly removed from said parcel of ground, and has since that time been forcibly kept from the occupancy of said grounds."

"That he did not consent but objected to the platting of said land as a street."

And under the holding of this court in the case of Cook *et al.* vs. McCord *et al.*, 9 Okla. page

200, and the holding of the United States Land Department in Betts vs. Townley, 20 L. D. 425, this is not abandonment, but preserves his entry intact.

Hence, it seems to us that if the findings of the district court of Canadian county were correct, and that the defendant in error, McMaster, was a legal occupying claimaint upon the land at the time the patent was granted to the townsite trustees, then no action of such townsite trustees or the city of Oklahoma City, or the other occupying claimants, could divest him of his right in the property in question, without his consent, and without compensation.

We think there was no error on the part of the district court of Oklahoma county, in admitting the record of this judgment as evidence.

The defendant below, the plaintiff in error here, claims that the court erred in admitting as evidence a certified copy of a certain order of the district court of Canadian county, made in Kingfisher county. But a reference to that order will show that it was an order designed to execute a previous order of that court. The order was in the nature of a mandamus, which, if the finding of the Canadian county court was that the defendant in error, McMaster, was entitled to a deed, at the hands of the townsite trustees, this would be the only adequate means by which the court could enforce such judgment. But it seems to us that the order made in Kingfisher county has but little bearing upon the merits of this case, for the reason that the rights of the parties had already been determined by the finding of the district court of Canadian county, in the order heretofore admitted by the court. If the finding of that court was correct, and its correctness, it seems

to us, cannot now be questioned after the time for appeal has expired, then McMaster was entitled to a deed at the hands of the townsite trustees, and such finding of the court was conclusive.

Hence, we think the decision of the lower court was correct, and the judgment is hereby affirmed; not intending that this opinion shall be at variance with the doctrine laid down in the case of City of Guthrie vs. Beamer, 3 Okla. 652, the facts in the two cases being different.

All the justices concurring except Burwell, J. and Burford, C. J., not sitting, and Pancoast, J., dissenting.

Dissenting opinion by Pancoast, J.:

I cannot concur in the foregoing opinion. McMaster acquired no vested interest in the land claimed by him by reason of his settlement and occupancy thereof; the land upon which he made settlement being designated by the plat and survey as a street divested him of whatever interest he may have had.

The City of Guthrie vs. H. C. Beamer, 3 Oklahoma, 652.

A townsite settler cannot maintain an action against a board of townsite trustees appointed under an act of Congress to compel a conveyance to him of property upon which he has made settlement.

The case of McMaster vs. The Townsite Trustees, tried in Canadian county, never went to judgment; the court in that case never proceeded further than to make findings of facts in the case. This was not rendering a judgment. Findings of fact by a court in a case tried to the court have no

more force nor effect than the verdict of a jury when the case is tried to a jury.

The order made in Kingfisher county did not help matters, as the judge had no power or authority to make an order or render judgment in the case when absent from the county; such order was a nullity.

A settler claiming property under the United States townsite laws, before he can maintain an action in the territorial courts to litigate his claim, must make application to the townsite trustees for a deed and if the trustees refuse to convey to him he must appeal and litigate the matter through all the branches of the Interior Department. If he fails to do this he abandons his claim, whatever it may be.

By platting Government land as a townsite into lots, blocks, streets and alleys, the streets and alleys designated are dedicated as streets and alleys to public uses, and when a municipal corporation is afterwards organized covering the territory embraced in such townsite such municipal corporation where no conveyance has been made to it of the streets and alleys does not become invested in the fee of such streets so as to enable one claiming a portion thereof to maintain an action for the title thereto.

BRIEF AND ARGUMENT.

The printed record will disclose to the Court, in fact it is conceded by counsel for McMaster, that this case is taken to this court both upon writ of error and appeal. This was done simply as a matter of precaution, because the case was one

which, where the practice of courts of equity and courts of law are kept separate, is a law case. We rely, however, upon the appeal as was done in the case of Stringfellow vs. Cain, 99 U. S., 610, and that, we claim, is the proper and correct method of bringing the case here and that the case is properly here upon appeal for consideration upon the merits of the question presented before this court. An examination of the case discloses that the Supreme court of the Territory, in deciding the case, made a statement of facts of the case and applied the law thereto. The statement of facts is contained in what the court calls a "statement of the case," in the opinion of the court, written by Irwin, J. Counsel for McMaster refer to this as the opinion delivered by Irwin, J., as if it were his separate opinion. This claim is certainly untenable, because the opinion is "the opinion of the court," by Judge Irwin. But the statement of the case and the facts found therein and in the opinion of the court are certainly as much the action of the court as if they had been contained in a formal "statement of the facts of the case in the nature of a special verdict," as provided for in the Act of April 7, 1874, Vol. 1, Sup. U. S. Rev. St., 7. All that act requires is that "instead of the evidence at large, a statement of the facts of the case," as shown by the evidence, shall be made by the Territorial Supreme Court. It does not require that it shall be in the form of a bill of exceptions or in any other particular form, but it is a statement to be made by the court. That was done in this case, and any other statement could hardly have sufficed to present the questions of merit involved to this court in a more clear and comprehensive form than that which has been done, and it would have been

asking a useless thing to have required the court to have re-assembled the judges in an extra session in order to have made a second statement of facts of the case, which would no doubt have been in nearly the same language and covered the same facts as those already stated in the court's decision.

This court, in examining what is presented, is not called upon to review any of the evidence in the case, because there is no dispute in this evidence. The reply of McMaster contained in the statement of the case by the Supreme Court of Oklahoma (page 62), and which would not have been contained in a separate "statement of the facts of the case," if made, because not a part of the evidence, but of the record, did not traverse the allegations of the city's answer as contained on page 61, that the parcel of land claimed by plaintiff and described in his petition, is a part of the original townsite of Oklahoma City, and situated in Grand Avenue, a public highway and street of said city, as appeared upon the original plat and survey of said city, approved by Board No. 2 of Townsite Trustees of Oklahoma City, on the 6th day of September. 1890, and filed and duly recorded, and that said land had been a part of said street for more than one year prior to the approval of said plat and survey by said Board of Trustees; and the only evidence offered by McMaster in support of his title to this land (pages 35 to 38), clearly shows the facts claimed by the city to be true, and which facts were found by the Supreme Court in its opinion. The claim of title of McMaster was therefore based entirely upon the finding of fact made in the case of McMaster against the Townsite Trustees in the

District Court of Canadian County, and the order made in pursuance thereof, and it was wholly upon the facts found in these findings, and none other, that the Supreme Court of the Territory bases its opinion sustaining McMaster's title in this case. This appears on pages 66, 67 and 68 of the printed record, and the court states these findings, beginning with the statement "the evidence in this case shows that the lots in controversy were a part of the tract of land conveyed by the United States to certain trustees for townsite purposes, as shown by the patent in evidence." * * And referring to the findings upon which the decision is based, the court says:

"This being true, we are at a loss to see why the findings of the court as to the facts therein submitted, were not binding and conclusive, not only upon the parties, but all parties claiming title under or through them."

And preceding this statement are the findings of fact, accompanied with the statement of findings.

"Now what did the District Court of Canadian County find as to the facts? By reference to the record of that court as shown in Exhibit 'A,' of the case made herein, IT WILL BE SEEN THAT THE COURT THERE FOUND. * * * That court further finds that on the 22nd day of April, 1889 * * * The court finds that subsequent to such occupancy * * * Now this finding of the Court shows that at the time this land was so opened for settlement * * * This being true, we take it * *"

The Exhibit "A" referred to was the Exhibit "A" contained in the "Case Made" in the District Court, and the finding made from it was the Exhibit "A" beginning on page 34 of the

printed record, and intended to cover both Exhibits "A" and "B," for the court there recites the substantial part of the findings as made by Judge Burford, and thus we claim carried the same into the opinion of the court, by its reference, with the same force and effect as if they had been specifically set out therein. And these findings, with the statement of the case contained in the opinion of the court, also show the facts upon which we base three of the important questions of law which we wish to present to this court in our argument and brief on the case under our assignment of errors which appear in the record now printed, and ask the court to consider. These are:

First—That the District Court of Oklahoma County had no jurisdiction to render judgment against the defendant there after it had vacated its first judgment and granted a second trial in ejectment under the statute; and

Second—That the plaintiff McMaster was not pursuing his proper remedy, and therefore is not entitled to the judgment rendered, because he could not maintain an action of ejectment to recover land held as a public street and highway, as this is admitted by the pleadings to be, and found by the Supreme Court of Oklahoma, and not contested by any proof presented in the record; but that his remedy was by pursuing the Oklahoma Statute to obtain damages for property taken and appropriated for public use, even if his claim of title was well founded; and

Third—Because by act of Congress and the patent to the trustees and the trustees' action in approving the plat of the townsite, the land became vested in the public for public purposes.

There are also a number of other questions

which we wish to present and which are based on the errors assigned upon the decision of the Supreme Court of Oklahoma.

We can hardly conceive of any statement of facts which can be made by the court in this case which will more clearly present to this court these questions and the other ones presented than are contained by what the Supreme Court has already made, and which has been certified and appears in the printed record before this court. The facts found by the court in the statement and findings to which we have referred cover all the facts necessary to present these questions.

This being true, we claim the authorities presented by counsel for McMaster do not support their contention that there is no statement of facts of the case here upon which the court can consider the merits of the questions presented. None of the cases cited present a case where the facts of the case and upon which the court from which the appeal was taken to this court, were presented, much less clearly and specifically presented as they are in this case.

The case of Stringfellow vs. Cain, 99 U. S., 610, is cited upon a question not in dispute here, but is particularly instructive and in point in this case. There the Supreme Court, while dismissing the motion in error, sustained the appeal and reversed the judgment of the Supreme Court of Utah, which court had reversed the judgment of the District Court because the evidence did not sustain the findings of fact, and in such case this court said:

"Other findings must be made before the case can be put in condition for hearing in this court on appeal."

And this court there, without deciding the proper practice in such cases, said:

"It is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the district court."

The court further held in that opinion that when the Supreme Court of a territory reversed the judgment of the district court because the findings of fact made by the district court were not sustained by the evidence, it was unnecessary to go through the circuity of action of sending the case back to the district court to make other findings of fact "in order to put the case in a situation for review in this court," and said:

"The District Court could do no more than find the facts which, in the opinion of the Supreme Court, should have been found before, and the judgment which should follow from these facts may just as well be settled by the Supreme Court on the first appeal as on the second. We conclude, therefore, that the case is properly here for decision upon the facts stated by the Supreme Court."

And so we claim here that if the Supreme Court of a territory can make findings of fact in its decision when it holds that the findings of the trial court are not sustained by the evidence and such a statement of facts is sufficient for review in this court, so, too, a statement of facts made by the court in its opinion which are in direct accord with what the record shows the decision of the trial court was based upon the record from which the Supreme Court of the Territory makes such findings, whether formal or informal, they are sufficient to present the questions of law desired for review by this court. The court there also based its opin-

ion upon "the facts as stated by the Supreme Court."

In the succeeding case of Cannon vs. Pratt, 99 U. S., 619, the court followed Stringfellow vs. Cain in the consideration of the questions presented by the record, and on page 623, with reference to to the opinion of the Supreme Court of Utah, said:

"In this case the rejected evidence was all before the Supreme Court, and was there considered. *In the opinion* it is in effect said that if the evidenc had been admitted in the court below, and if that court had given it all the force which could be reasonably claimed, the result must have been the same. Under these circumstances we must consider the case as coming here from the Supreme Court, with the facts found upon all the evidence."

Thus the court recognized the claim which we make, that the court should consider the opinion of the Supreme Court of a territory in determining whether the court has made "a statement of the facts of the case," as required by the 1874 act.

The case of Hecht vs. Broughton, 105 U. S., 235, is a proceeding in error to the Supreme Court of the Territory of Wyoming taken in a case where there was no trial by jury. The motion to dismiss the writ of error was sustained because the case should have been brought up by appeal and not on error. There is nothing in the decision of this court in that case which prevents the facts as found by the Supreme Court of the Territory in this case from being taken as a statement of facts sufficient to present the application of the law as applied thereto, for review by this court.

In Idaho & Oregon Land Improvement Co. vs. Bradbury, 132 U. S. 509, the Clerk had failed to sign the certificate transmitting the record to this court, but the court permitted an amendment

and considered the act of April 7, 1874, referred to, and said:

"The necessary effect of this enactment is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law."

Now we are not asking, in the case at bar, any review in matter of fact, but are only asking this court to pass upon the questions of law which we present upon the facts as presented by the decision of the Supreme Court of the Territory of Oklahoma, and we are asking this court to consider the facts as they are stated in the opinion of that court, and to correct the application of the law thereto.

A review by this court of the case of Marshall vs. Burtis, 172 U. S. 630, cited, will disclose that there was no finding of fact made by the Territorial court in its opinion or otherwise, and so the court necessarily concluded:

"There was no finding of fact by the district court or by the Supreme Court, hence no 'statement of facts in the nature of a special verdict,' and we must assume that the judgment of the district court was justified by the evidence."

But in this case no such assumption is necessary, and no recourse to the evidence is required, for the court has found what the facts were to which it made its application of law, which alone we claim to be incorrect.

In the case of Gray vs. Howe, 108 U. S. 12, the syllabus reads:

"Where the Supreme Court of a Territory on appeal reverses a judgment of a district court and sets aside findings of fact, and makes no new statement of facts in the nature of a special verdict, the

judgment of the Supreme Court of the Territory must be affirmed on appeal."

But in the case at bar there was no reversal of the district court, but there was a statement of facts of the case made by the Supreme Court of the Territory.

In the case of Salina Stock Company vs. Salina Creek Irrigation Company, 163 U. S. 109, it appears that:

"There the Supreme Court of the Territory set aside the findings of the trial court, and directed a decree on the evidence, at the same time making its own findings from the evidence; and this court refused to disturb the decree of the Supreme Court,"

and quoted from Stringfellow vs. Cain, supra,

"Without undertaking to decide what would be the proper practice in an ordinary civil action when a judgment is reversed because a new trial was refused in the district court, we are clearly of the opinion that in a suit like this, where all the evidence is before the Supreme Court that could be considered by the district court if the case should be sent back, it is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the district court."

This court further said:

"It has been frequently held that the authority of this court on appeal from the Supreme Court of a Territory is limited to determining whether the court's findings of fact support its judgment or decree, or whether there is any error in rulings duly excepted to in the admission or rejection of evidence. * * * and as this record presents us with no statement of the facts to enable us to determine whether the facts found were sufficient to sustain the judgment rendered, * * * "

The language of this court in that point bases the determinations of the court upon the question

of the sufficiency of the record, to present the facts not upon the *form* in which the findings of the Supreme Court of a Territory are presented, but whether the findings of fact support its judgment, or were sufficient to sustain the judgment rendered. That case was affirmed because there were no findings of fact for the Supreme Court to review, and not because the facts *found were not* in some prescribed form.

The case of Zeckendorf vs. Zeckendorf, 171 U. S. 686, is a decision announced without opinion on the authority of earlier cases on the point.

In the case of Cohn vs. Daley, 274 U. S. 539, there was no statement of facts on which the Supreme Court of Arizona had based its opinion.

The case of United States vs. Hooe, 1 Cranch., 318, the declaration was made that a statement of facts must accompany the transcript, but nothing which would be authority for holding that the statement of facts made by the court in this case is insufficient.

There is nothing in the case of Davis vs. Fredericks, 104 U. S. 618, which is opposed to the view we take. There a statement of facts was made by the Supreme Court of Montana and considered by this court.

The pivotal point in the brief of counsel for McMaster is contained in their claim that the opinion of the court does not contain such a statement of facts as may be considered by this court, and the decision is referred to as the opinion of "Irwin, J.," meaning, we suppose, that the findings therein contained should be considered as only the statement of one judge. This is certainly untenable, for the opinion is the "opinion of the court by Irwin, J.," (page 63), "and is concurred in (page 71)

by sufficient of the judges to make it the opinion of the court. It is, therefore, we claim, equivalent to a statement made by the court, and it is certainly so certified here. The authorities cited, together with other cases determined by this court, do not sustain their claim.

The statement made by the Supreme Court of Arizona in Thompson vs. Ferry, 180 U. S. 484, does not disclose the facts, or any of them, to which the court applied the law. It is a mere recital of proceedings, with no statement of the facts upon which the court was basing its decision of law.

In the case of Stone vs. United States, 164 U. S. 380, there was a finding that the claimant had not proved his case, but there was no finding of the facts proved or presented at the trial. The court held:

"We are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings",

and the court then went on to say

"Neither is this a case like the United States vs. Clark, 96 U. S., 37, in which in one finding was stated the testimony and in another the conclusions as to the ultimate fact, in which case the court held it might consider the sufficiency of such testimony to establish that principal fact, for here the finding does not disclose the testimony, but only describes its character, and, without questioning its competency, simply declares its insufficiency."

That decision certainly is no support for the claim that this court may not refer to the opinion of the court to determine the facts upon which its decision is based, when that opinion specifically sets out the facts to which the court has applied the law.

In the case of Saltonstall vs. Birtwell, 150 U. S., 417, this court held that the findings of the Circuit Court were insufficient to support the judgment which the court has rendered, and held that a resort could not be made to the opinion of the court to help out these insufficient findings in order to support a judgment based on insufficient findings; while in the case at bar we claim that the court's judgment is erroneous as a matter of law, on the facts on which it states it is based. In the case at bar the statement of facts upon which the Supreme Court bases its judgment is contained in the opinion of the court. Besides in this case of Saltonstall vs. Birtwell, this court reversed the case and remanded it for a new trial because of insufficiency of facts found, and here we claim that the facts found and stated by the Supreme Court of Oklahoma require a different judgment than that rendered by the court on those facts.

The case of Dickinson vs. The Planters Bank, 16 Wallace, 250, was a proceeding in error of the Circuit Court. The court held:

"It is very clear that in this case there were no special findings of fact upon which any judgment for the plaintiff could have been rendered." and

"It is impossible to regard anything that appears in this case as equivalent to a special verdict."

And we respectfully suggest that the findings which appear in the opinion of the Supreme Court of Oklahoma, whose review we ask here, are "equivalent to a special verdict," and, in fact, were fuller than a special verdict, because not only are the facts given, but special reference is made to the findings of fact made by Judge Burford in the District Court as an exhibit to the case, and being so

referred to, should be considered by this court the same as if fully set out in the opinion.

In the case of Insurance Company vs. Tweed, 7 Wallace, 44, the court, in speaking of the statement of facts, says:

"The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection often referred to in this court, that it states the evidence and not the facts, as found from the evidence. Besides, it does not profess to be a statement of facts, but is very correctly called in the transcript, 'reasons for judgment."

We have thus reviewed every case cited by counsel in their brief on the question involved here. This court, however, has spoken elsewhere on this question, and we think, decisively in our favor, and shows that what is meant by the decisions of the court on this question is not that the Supreme Court will not consider the findings made by the Supreme Court of a Territory in order to determine whether the law has been correctly applied, because the findings are stated in the opinion instead of being recited in a separate document, but that the court will not investigate the evidence presented in order to determine whether the findings which the court has made are supported by sufficient evidence.

In the case of Haws vs. Victoria Copper Mining Co., 160 U. S., 303-313, the court said:

"We cannot, therefore, enter into an investigation of the preponderance of proof, but confine ourselves to the findings and their sufficiency to support the legal conclusions which the court below has rested on them. THE STATEMENT OF FACTS CONTEMPLATED BY THE STATUTE IS ONE TO BE MADE BY THE SUPREME COURT FROM WHOSE JUDGMENT THE APPEAL IS TAKEN. But where that court

affirms the findings of the trial court, being thus adopted by the Supreme Court of the Territory, they subserve the purpose of the finding of fact upon the appeal to this court. Stringfellow vs. Cain, *ubi supra*. Guided by this rule, we will examine the errors pressed upon our attention."

Now this authority clearly holds that the statement of facts contemplated by the statute in question should be made by the Supreme Court. That statement of facts has been made in this case. That case is affirmed in Gildersleeve vs. New Mexico Mining Co., 161 U. S., 573-577.

But in any event this cause should not be affirmed, as moved by counsel for McMaster, defendant in error.

We supplement this brief with a motion which will permit the supplying of the statement of facts if it should be held necessary. The case of Zeckendorf vs. Zeckendorf, 123 U. S., 617, cited by counsel, we consider would not entitle them to an affirmance of the judgment in this case, even if our contention herein presented were held incorrect. In that case findings of fact had been made by the Supreme Court of Arizona. The errors assigned related only to the sufficiency of the evidence to support these findings. That question of course could not be considered here, and no supplement or amendment to the record would have enabled the courts to have presented the questions sought to be presented on the assignment. It was therefore held apparent to the court that if the case was kept there longer, it would be for delay only, but the relief which we now ask, if the court should consider such course necessary, would avoid the objection made by counsel for McMaster.

We respectfully present the foregoing brief to

the court in confidence that our position is fully sustained by the decisions herein referred to, but in order that there may be no question that our client's case may be considered upon the facts presented in the record and passed upon in the opinion of the Supreme Court of Oklahoma, and upon the errors of law which we have assigned to the application of the law to those facts, and which we will call to the court's attention in our brief on the merits of this case at the proper time, we present this brief and the motion which follows.

Respectfully submitted,
S. A. McGINNIS,
City Attorney.
C. PORTER JOHNSON,
FRANK DALE,
A. G. C. BIERER,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK McMASTER, Defendant in Error.
No. 137.

ALTERNATIVE MOTION OF PLAINTIFF IN ERROR FOR AN ORDER TO THE SUPREME COURT OF OKLAHOMA TERRITORY TO TRANSMIT A STATEMENT OF THE FACTS OF THE ABOVE CAUSE IN THE NATURE OF A SPECIAL VERDICT.

Comes now the plaintiff in error, the City of Oklahoma City, and moves the court to make an

order upon the Supreme Court of Oklahoma to make, certify and transmit to this court a statement of facts of the above cause in the nature of a special verdict, said order to be made if, in the judgment of this court, upon consideration of plaintiff's motion to affirm the judgment appealed from, it is necessary that such statement be presented with the record in order that this court may consider and review the decision of the Supreme Court of Oklahoma and determine whether the law has been correctly applied to the facts presented by the record of said cause in the Supreme Court of Oklahoma, and in order that this court may determine whether certain findings of fact made by Judge Burford in the case of Frank McMaster vs. The Townsite Trustees, in the District Court of Canadian County, Oklahoma, were competent and admissible as evidence in said case, and whether, if admissible, the facts therein found and recited, in the opinion of said Supreme Court, warrant the judgment rendered. Plaintiff in error states that until the question was raised by counsel for Frank McMaster, defendant in error, as to the necessity for any such statement, counsel for said city considered the statement of the case and facts stated and presented by the opinion of the Supreme Court of the Territory of Oklahoma sufficient to present these questions and the questions sought to be presented to this court in their behalf on the merits of this cause.

That this motion is not made for the purpose of delay, but in order that justice may be done, and this cause presented upon the merits; that this case was not finally disposed of by the Supreme Court of Oklahoma until the 10th day of September, 1903, when the petition for re-hearing was de-

nied (see record, page 76), and the petition for appeal and writ of error to the Supreme Court of the United States and the order for such writ of error and appeal were presented and obtained and filed in the Supreme Court of Oklahoma, October 10, 1903, and that this cause has been prosecuted by the appellant with all due expedition.

S. A. McGINNIS,
City Attorney.
C. PORTER JOHNSON,
FRANK DALE,
A. G. C. BIERER,
Attorneys for the City of Oklahoma City,
Plaintiff in Error.

TERRITORY OF OKLAHOMA,
Logan County. } ss.

A. G. C. Bierer, being duly sworn, deposes and says that he is counsel for the plaintiff in error, the City of Oklahoma City, in the above entitled cause; that he has read and knows the contents of the above and foregoing motion, and the statements therein contained are true, and that he knows that the appeal in this case is not made for the purpose of delay, but is made in good faith for the purpose of obtaining a decision of this court upon the merits of the questions presented; and this motion is now made for a like purpose in case this court should consider a formal statement of the facts of the case should be made by the Supreme Court of Oklahoma, in addition to the one presented in the statement of the case and opinion of the court, as appears from the record.

A. G. C. BIERER.

Subscribed and sworn to before me this 17th day of November, 1904.

W. M. BRONSON,
Notary Public.

[SEAL.]

My commission expires December 27, 1906.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

City of Oklahoma City,
Plaintiff in Error,
vs.
Frank McMaster,
Defendant in Error.
No. 137.

BRIEF ON ABOVE MOTION.

In the case of Idaho Land Co. vs. Bradbury, 132 U. S. 509, in which the clerk of the Supreme Court of Idaho Territory failed to sign the certificate to the record transmitted, the court made an order allowing the record to be withdrawn and amended by procuring the signature of the clerk of the Supreme Court of the Territory to the certificate of authentication. A motion to dismiss the case had been made on the ground that the record was not authenticated. Upon this the court said:

"Considering the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk."

It was the clerk's duty in that case to have properly authenticated the record. It is the court's duty in this case, under the act of April 7, 1874, 18 Stat. at Large, pages 27-28, to make "a statement of facts of the case in the nature of a special

verdict," and this statement the act provides "shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

Now we contend that if a more formal statement of the facts than that which this record presents is deemed necessary by this court, then it is the duty of the Supreme Court of Oklahoma to present such statement, and, if so considered necessary, then we wish this statement, in order to present the merits of this cause to this court. Such an order need delay this proceeding very slightly, and we respectfully suggest, can be made and returned to this court in a short time and with but slight delay, and this leave to amend these proceedings by adding this statement should be permitted, if by the court considered necessary, as above suggested, in furtherance of justice.

The order asked for by counsel for defendant in error, that is, the affirmance of the judgment appealed from, certainly should not be made, even if the more formal statement of facts of the case is deemed necessary by the court; for if the record is not sufficient to present the errors assigned and relied on, then the appeal should only be dismissed without prejudice to another appeal within the time allowed by law, and without delay, unless this court will permit the correction to be made by the Supreme Court of Oklahoma, furnishing the statement of facts of the case considered necessary. But that will entail the re-certification and printing of the same record now before the court, at considerable expense, and would entail a year's delay, a thing we do not ask or wish. Whereas, the furnishing of the statement, as we ask to be done, if

deemed necessary, need not delay the case more than from one to three months.

We therefore very respectfully ask that an opportunity be given to supply the formal statement of facts of the case, in the nature of a special verdict, if, upon considering plaintiff's motion and brief and our answer brief, such statement, in addition to the statement of the case and facts presented in the opinion of the court, as appears from the record now printed, is necessary to present the errors assigned by us on our appeal.

Very respectfully submitted,

S. A. McGINNIS,
City Attorney.
C. PORTER JOHNSON,
FRANK DALE,
A. G. C. BIERER.
Counsel for Plaintiff in Error.

TERRITORY OF OKLAHOMA,
Logan County. } ss.

A. G. C. Bierer, being duly sworn, deposes and says that on November 17, 1904, at the City of Guthrie, Logan County, Oklahoma Territory, he deposited in the United States mail a letter addressed to Mr. Francis J. Kearful, at his office address, No. 52 William Street, New York City, New York, together with three (3) copies of the forego ing answer to motion to dismiss and affirm, and brief in support thereof, and alternative motion of plaintiff in error for an order on the Supreme Court of Oklahoma Territory to transmit a statement of the facts of the above cause, in the nature of a special verdict, and brief in support thereof; the said Francis J. Kearful being counsel of record for

defendant in error, Frank McMaster, and that being his proper address; said letter was deposited postpaid, and the time when it was so mailed was such as to reach said counsel by due course of mail seven days before November 28, 1904, the time fixed by the notice given by defendant in error, of the presentation of his motion to dismiss the writ of error and affirm the judgment appealed from, to which the said answer, briefs and motion of plaintiff in error are a response.

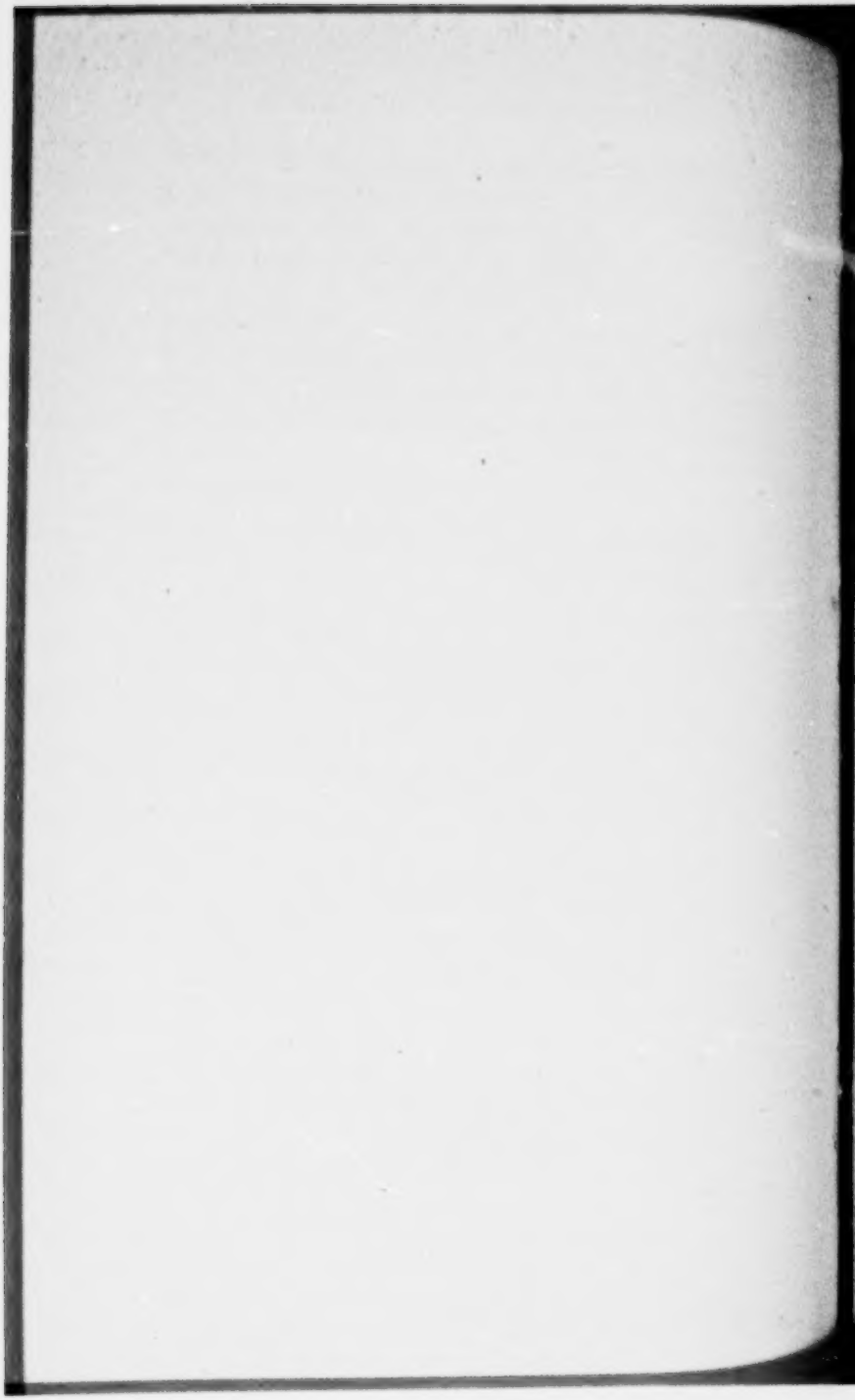
A. G. C. BIERER.

Subscribed and sworn to before me this 17th day of November, 1904.

W. M. BRONSON,

[SEAL.] Notary Public.

My Commission expires Dec. 27, 1906.



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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1904

THE CITY OF OKLAHOMA CITY,
Plaintiff in Error,
vs.
FRANK McMASTER,
Defendant in Error.

No. 137

Appeal from the Supreme Court of the Territory of Oklahoma.

BRIEF OF APPELLANT.

S. A. McGINNIS, City Attorney,
C. PORTER JOHNSON,
FRANK DALE and
A. G. C. BIERER,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1904

THE CITY OF OKLAHOMA CITY,
Plaintiff in Error,
vs.
FRANK McMASTER,
Defendant in Error.
No. 137

Appeal from the Supreme Court of the Territory of Oklahoma.

STATEMENT OF FACTS.

This case was begun in the District Court of Oklahoma County, Oklahoma Territory, by Frank McMaster, defendant in error, as plaintiff, against the City of Oklahoma City plaintiff in error, as defendant, and is an action in ejectment to recover a piece of ground fifty feet in width, and one hundred forty feet in length, described by metes and bounds, as commencing at a point in said City at the Southeast cor-

ner of Block twenty-three (23) as shown by the Trustees' plat thereof, and which ground lies in and is a part of a street designated as Grand Avenue in the City of Oklahoma City. (Answer in court's opinion, page 60 of record, with plat following page 38, and findings of fact pages 68, 36 and 37.) Plaintiff's petition also prayed damages for the retention of the ground. Demurrer was presented to this petition, and overruled. (Opinion page 60.) The defendant then answered by general denial, and by separate defense, stating that the land involved is in Grand Avenue, of said city as appears on the original plat and survey of said City of Oklahoma City, approved by the Board of Townsite Trustees, Number Two, on the 6th day of September, 1890, and duly recorded. (Page 60). A reply of general denial was filed to this answer, denying the averments of the answer, which contradicted the averments of the petition but not denying the allegations of new matter in the answer. (Page 62). Trial was had before the court and evidence offered. (Pages 62-63). Upon the issue as to the plaintiff's title, plaintiff produced in evidence patent issued by the President of the United States on the first day of October 1890, to Edgar N. Sweet, Levi E. Coe, and David H. Hammons, trustees of the townsite of Oklahoma City, in trust for the several use and benefit of the occupants of said townsite of Oklahoma City, under act of Congress of May 14, 1890, for the southeast quarter of section thirty-three (33) in township twelve (12) north, of range three (3) west of the Indian Meridian, in Oklahoma Territory, containing one hundred and sixty (160) acres; (pp. 35-62-68), also, certain findings of fact made by John H. Burford, Judge, in an action pending in the District Court of Canadian County, Oklahoma Territory, by Frank McMaster vs. The said Townsite Trustees. These findings were with reference to the settlement, occupancy, etc., of Frank McMaster, and will be more specifically referred to in the argument (pp. 36, 37, 62 and 68). Also, a certain order made by Judge Bur-

ford while holding court in Kingfisher County, Oklahoma Territory, but made in the case of Frank McMaster vs. The Townsite Trustees, pending in the District Court of Canadian County, said order being that the trustees make and issue a deed to Frank McMaster for the tract of land sued for. (See pp. 38-62.) The defendant demurred to this evidence, (pp. 29–62), which demurrer was overruled and excepted to, (pp. 30–62). Defendant then produced in evidence the final receipt of John H. Burford, Register of the United States Land Office at Oklahoma City, Oklahoma Territory, on which the patent produced by plaintiff was issued. (pp. 39–63.) Also the plat of the townsite of Oklahoma City, approved by Edgar N. Sweet, Levi E. Coe, and David H. Hammons, trustees of said townsite, the same consisting of the southeast quarter of section thirty-three (33), in township twelve (12) north, of range three (3) west, of the Indian Meridian in Oklahoma County, Oklahoma Territory, in September, 1890, and which plat was approved as strictly conformable to the said survey and according to the Act of Congress approved May 14th, 1890. That said plat was filed for record in the office of the County Clerk, who was, under the Nebraska law then in force in Oklahoma, Register of Deeds for the county on September 8th, 1890. (See plat, following page 38, referred to in the Court's statement of facts. Pp. 63–68). The defendant then rested. (p. 63.) The plaintiff then offered in rebuttal certain proceedings with reference to the incorporation of the village of Oklahoma City (pp. 40 to 47), which is of no importance to the questions we present.

The trial court on July 7th, 1900, rendered judgment for the plaintiff and against the defendant Oklahoma City for the recovery of this piece of ground and damages of $250 per year for three years next preceding the commencement of the action, to which the defendant excepted, and upon request of the defendant, by notice upon the journal of the Court demanding a second trial of said cause, as provided

by statute in ejectment, granted a second trial. and the judgment then rendered was by the court set aside and vacated and the order granting a second trial made, and the cause continued until the next term of court. (pp. 48–63.) Afterward, the plaintiff filed a motion to set aside the Court's order and decree granting a second trial (pp. 49, 50–63), and on the 29th day of April, 1901, plaintiff's motion to reinstate the judgment rendered in his favor on July 7, 1900, was sustained (pp. 51–63). On the same day the defendant, the city of Oklahoma City, filed its motion for a new trial (pp. 51–63) and on June 1st, 1901, this motion for a new trial was overruled, defendant excepting (p. 52–63) and appeal granted to the Supreme Court. On August 5th, 1901, the city of Oklahoma City filed its appeal from said judgment in the Supreme Court of the Territory of Oklahoma, and on June 6th, 1903, the judgment of the trial court was affirmed by the Supreme Court of Oklahoma (p. 58). Appeal has been taken from the judgment of the Supreme Court of Oklahoma to this Court. and the transcript with assignments of error were lodged in this Court on November 6th, 1903.

ASSIGNMENTS OF ERROR.

Among the errors set forth in the assignments of error by plaintiff in error, are the following, upon which we rely:

First: The Supreme Court of the Territory of Oklahoma erred in holding and deciding as a matter of law that appellant, plaintiff in error here, and plaintiff in error in the Supreme Court of the Territory of Oklahoma, had waived and abandoned the assignments of error made in the Supreme Court of the Territory of Oklahoma, and embraced within the first and second assignments of error as stated in the opinion of the Supreme Court of Oklahoma Territory in reciting that plaintiff in error had

abandoned certain assignments of error, including the assignment of error that the District Court had erred in setting aside the order and decree of the Court made granting a new and second trial as a matter of course in said ejectment suit, as provided by the laws of Oklahoma Territory.

Second: The Supreme Court of the Territory of Oklahoma erred in affirming the judgment of the District Court setting aside that part of the decree and order of the court granting a new and second trial as a matter of right in said ejectment case, and in reinstating said judgment of the plaintiff.

Third: The Supreme Court of the Territory of Oklahoma erred in affirming the judgment of the trial court in reinstating the judgment against the appellant, plaintiff in error, upon the motion of defendant in error, after said judgment had been by its own provisions set aside and vacated, as provided in said judgment, and said cause continued for the term, and without any evidence being thereafter produced upon which to warrant the reinstating of said judgment, or to warrant the rendition of a judgment against said defendant.

Fourth: That the Supreme Court of the Territory of Oklahoma erred in affirming the judgment and ruling of the trial court in admitting in evidence against this plaintiff in error, and over its objections at the trial of said cause, a copy of certain findings made by the District Court in Canadian County, Oklahoma Territory, in a case wherein Frank McMaster was plaintiff and Edgar N. Sweet, Levi E. Coe and David H. Hammons, constituting the trustees of Board No. 2, of the City of Oklahoma City, were defendants and in admitting in evidence against this plaintiff in error and over its objections, a copy of a certain order and judgment rendered and entered in said cause of Frank McMaster vs. said townsite trustees by Judge John H. Burford, while hold-

ing court in Kingfisher county, Oklahoma Territory. (See said orders in brief and argument.)

Fifth: That said Supreme Court of the Territory of Oklahoma erred in holding as a matter of law that the findings of facts made by the District Court of Canadian County, in an action by said defendant in error, Frank McMaster against said Board of Townsite Trustees, Board No. 2, composed of Edgar N. Sweet, Levi E. Coe, and David H. Hammons, constituted a judgment and final conclusion of the District Court of Canadian County, and that said findings were competent evidence and conclusive in that court.

Sixth: That said Sepreme Court of the Territory of Oklahoma erred in holding that the Townsite Trustees of said Board of Trustees No. 2, assigned to townsites in Oklahoma, were subject to a suit by a land or lot claimant to recover any part of said trust lands, and in holding that a beneficiary of said trust could maintain an action against the trustees to determine his claim of title and enforce the same prior to the time that the said trustees had conveyed the title vested in them for a trust purpose.

Seventh: The Supreme Court of the Territory of Oklahoma erred in holding and deciding as a matter of law in this case that where a claim had been entered upon public lands which are opened to settlement, and a party had made settlement thereon for homestead purposes and has vested rights therein, such rights cannot be taken from him for public use except by due process of law, and the payment of just and reasonable compensation therefor, in this, that said principle of law is not applicable to this case, because the defendant did not claim any right to the property by virtue of settlement made under the homestead laws of the United States, but claimed a right thereto as a townsite occupant, and said Supreme Court of Oklahoma Territory erred in holding and deciding that the defendant in error had a vested

right in and to the land in controversy, under the facts in this case.

Eighth: The Supreme Court of the Territory of Oklahoma erred in holding, as a matter of law, that the plat made by said Board No. 2, of the Townsite Trustees platting the land patented to said Townsite Trustees for townsite purposes into lots, blocks, streets and alleys, did not vest the title to the streets so platted for public purposes in the public, and in holding that the plaintiff had property which was located in said street so platted and which was taken from plaintiff, defendant in error, without due process of law.

Ninth: That the Supreme Court of the Territory of Oklahoma erred in holding and deciding as a matter of law, that defendant in error, Frank McMaster, plaintiff in the trial court, had a vested interest in the land in controversy, and which was composed of parcels of land located in the streets of Oklahoma City, as shown and declared by the plat approved by the said Board of Townsite Trustees, constituted and appointed under Act of Congress of May 14th, 1890, governing townsites in Oklahoma Territory.

Tenth: That said Supreme Court of the Territory of Oklahoma erred in not holding, as a matter of law, that when the Board of Townsite Trustees, constituted and appointed under the Act of May 14th, 1890, governing townsites in Oklahoma, made and approved a plat of said townsite, all of the land so located in the streets as shown by the plat approved by said Trustees, was vested in the public for public uses and were devoted to public purposes as a public street and highway.

Eleventh: That said Supreme Court of the Territory of Oklahoma erred in holding, as a matter of law, that the defendant in error, plaintiff in the trial court, had a vested interest in the land in controversy, which land it appears was located in a street in the City of Oklahoma City when

the land was platted by the Trustees of said townsite, and the plat approved by said trustees, and in holding that a vested interest could be obtained in and to a part of said townsite, which, when the same was platted by the said townsite trustees, was shown to be in a street of said townsite.

Twelfth: That the said Supreme Court of the Territory of Oklahoma erred in holding as a matter of law that a person who was not in possession of a part of said townsite at the time the same was patented to the Townsite Trustees in trust for the use and benefit of the occupants thereof for townsite purposes, including the location of streets and alleys, had or could have a vested interest in said townsite, and particularly in a part of said townsite which had been by the occupants of said townsite prior to the patent thereof for the several use and benefit of the occupants thereof, devoted to the public use as a street.

Thirteenth: That the Supreme Court of the Territory of Oklahoma erred in affirming the judgment rendered in said cause in the District Court of Oklahoma County, Oklahoma Territory.

Fourteenth: That the Supreme Court of the Territory of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County in overruling the motion of the plaintiff in error for a new and second trial therein.

Fifteenth: The Supreme Court of the Territory of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County in said cause and in not ordering that judgment be rendered and entered for the City of Oklahoma City, plaintiff in error, and against Frank McMaster, defendant in error, upon the findings of fact and record in said cause.

BRIEF AND ARGUMENT.

First, Second, and Third Assignments of Error.

VACATION OF ORDER GRANTING SECOND TRIAL. RE-INSTATEMENT OF JUDGMENT, WITHOUT JURISDICTION.

Under these three assignments, we claim that there is manifest error in the action of the trial court, the District Court of Oklahoma County, Oklahoma Territory, and which was affirmed by the Supreme Court of Oklahoma, in vacating that part of the judgment in favor of McMaster and against the City of Oklahoma City which sustained defendant's demand for a second trial as a matter of right. The Supreme Court of Oklahoma stated but did not pass upon this question in its opinion (page 63 of record). We claim the right to have this question considered here, first, because it was mentioned in the brief of counsel then appearing for Oklahoma City (p. 80), and second; because even if not urged to the extent which the Supreme Court of Oklahoma might consider that it should have been, it came under the assignments of error that were presented in the petition in error to the Supreme Court of Oklahoma (p. 19). It was one of vital importance, and of substantive right, and also, is a jurisdictional question which this court may, and we think should consider, here.

This case is one in ejectment brought for the recovery of real property (see pages 21-59). It was tried to the court without the intervention of a jury, and judgment rendered in favor of plaintiff, McMaster, on July 7, 1900, (record pages 47-62). Immediately upon the rendition of the judgment, the plaintiff in error, against whom the judgment was rendered, by motion upon the journal of the court, demanded a second trial as a matter of right, which demand was granted and the judgment was set aside, and the case con-

tinued to the next term (pages 48-63). The order setting aside the judgment and granting a new trial, was a part of the judgment itself, all pronounced at the same time, and embraced in the same entry (pages 47-48).

Afterwards, and on January 21, 1901, McMaster filed a motion to set aside the order granting a new trial, and on February 11, 1901, he filed a second motion for the same purpose (pages 49, 50 and 63). On April 29, 1901, the court sustained said motion of McMaster's, and vacated the order granting a new trial, and re-instated the judgment, to which ruling of the court the plaintiff in error duly excepted (pages 51-63). This being an action for the recovery of real property, the plaintiff in error, against whom the judgment was rendered, was entitled to a second trial as of right. This is granted by the Statutes of Oklahoma. Section 4792, Wilson's Rev. Ann. Stat. (Civ. Code, Sec. 594) reads:

"In an action for the recovery of real property, the party against whom judgment is rendered, may, at any time during the term at which judgment is rendered, demand another trial by notice upon the journal, and thereupon the judgment shall be vacated, and the action stand for trial at the next term."

This statute is imperative. In a recent case, the Supreme Court of Oklahoma, construing this statute in the case of Keller vs. Hawk, 74 Pac. (Ok.) 106, 13, Ok., 261, says:

"There is no discretion vested in the court to grant or refuse the demand according to any equities or rights of the parties. If the action is for real property, either party, plaintff or defendant, against whom judgment is rendered, is entitled to another trial as a matter of right, if he makes the request in time and manner as required. It is the duty of the court, when the proper demand is made, and entered upon the journal, to vacate and set aside the judgment, and continue the cause until the next term."

This statute was adopted from the statutes of the State

of Kansas, in 1893, and prior to such adoption had received judicial construction by the Supreme Court of that State, and the rule as laid down in the case of Keller vs. Hawk, supra, has been the uniform holding of the Kansas Supreme Court.

Kennedy v. Haskill, 73 Pac. (Kas.) 913;
Doster v. Sterling, 33 Kas. 381, 6 Pac. 556.

The case at bar is squarely within the terms of the statute and when the demand for a second trial was made by the plaintiff in error, against whom the judgment was rendered, it was the imperative duty of the court to vacate such judgment.

It being clear that the trial court committed error, can the appellant properly urge such error in the Supreme Court of the United States? It may be urged by the defendant in error that in-as-much as the question was not argued in the brief of plaintiff in error which was filed in the Supreme Court of the Territory. that such error is waived and cannot be considered by the Supreme Court of the United States. We have examined the decisions of the Supreme Court of the United States, and find it to be the rule that the court will consider no questions not presented in the brief in the Supreme Court of the Territory, except such as are jurisdictional, or go to the right of the action.

It is our contention, however, that the error was sufficiently pointed out in the brief filed in the Supreme Court of the Territory to justify a review of the alleged error, (see page 80 of the record), and even if we are wrong in this respect, we insist that the error should be considered, because it involves a jurisdictional question which may be urged for the first time in the Supreme Court of the United States.

An examination of the record and briefs filed by the plaintiff in error in the Supreme Court of the Territory,

discloses that the ruling of the trial court in setting aside the order granting a new trial and re-instating the judgment, was duly excepted to by plaintiff in error at the time the ruling was made. This ruling was set out in the petition in error, and was urged as one of the grounds for a reversal of the judgment of the lower court. (Page 19). It was pointed out by the plaintiff in error in its brief filed for the consideration of the court (see page 80, of record brief of plaintiff in error.) This was sufficient to bring the error to the attention of the appellate court. It was sufficient to show that the point was not waived even if the attorneys who tried the case had the power to waive it on behalf of the municipality. The court had no right to presume that the point was abandoned merely because it was not argued in the brief. It was jurisdictional, and could not be waived in this manner, especially by the attorneys for the municipality. True, ordinarily as held in the decision appealed from, where errors are not insisted upon, and are not argued in the briefs, they will be deemed waived. But this is not, or should not be, an unbending rule. As pointed out by Judge Brewer, in the case of State vs. Stewart, 24, Kansas, 350, where the error is alleged, and is so glaring, and so prejudicial as to materially affect a substantial right, the court will consider it. Moreover, the error here complained of, goes to the power of the trial court to reinstate its judgment after the same had become null and void by reason of the order setting it aside.

In Windsor, vs. McVeigh, 93 U. S. 247, it is said:

"The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

As we understand it, by jurisdiction is meant the power conferred by law upon a court or judicial officer to hear and determine the matter in controversy between litigating parties, and to decide whether that state of facts exists which confers jurisdiction as well as all other matters properly raised in the case before the court. This power may be to exercise its authority rightfully, or it may act in excess of its jurisdiction, although having jurisdiction of the subject-matter, and decide wrongfully.

Under the law of the Territory the defendant in the trial court was by this departure from the prescribed practice, denied a second trial, upon which he was entitled to rely.

In the case of Ex parte Lange, 18 Wall. 178, it is said:

"There is no more sacred duty of a court, than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases, no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

In Voorhees, v. Jackson, 10 Peters, 449, it is said:

"If not warranted by the Constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice;* that is, by persons assuming the judicial function in the given case without lawful authority."

Plaintiff in error contends that this was an act in excess of the jurisdiction of the court. True, the court had the power to hear and determine controversies of this class, but only to exercise that power within its jurisdiction, which was limited by law.

It could not deny a second trial and enter a final judgment. When it did that, it ceased to act within its legiti-

mate power over the subject matter to adjudicate rightfully, and proceeded to exercise its power and act wrongfully.

It is not a mere question of erroneous judgment or of irregularity in obtaining the judgment, but it goes to the jurisdiction of the court, and the judgment is void. The power to assume jurisdiction is not denied, but the right to exercise jurisdiction not founded under and derived from the law of the land, and not exercised in the manner prescribed by the law, is here challenged.

In Curtis vs. Brown, 29 Ill., 201, the court said:

"We often find the jurisdiction denied where the power exists, but ought not to be exercised, and in this sense is the word 'jurisdiction' usually used when applied to courts of chancery. Where there is a want of power, the decree is void collaterally; but where there is said to be a want of jurisdiction merely, it is only meant that it would be erroneous to exercise the power, and the decree would be reversed on appeal,"

In Cooley on Torts, page 417, it is said:

"The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not either actually or constructively before him for that purpose. Neither is he exercising the judicial function when, being empowered to enter one judgment, or make one order, he enters or makes one wholly different in nature. When he does this, he steps over the boundary of his judicial authority and is as much out of the protection of the law in respect to the particular act as if he held no office at all. This is the general rule. Jurisdiction in a judge may be defined as the authority of law to act officially in the matter then in hand."

It must therefore follow as a legal conclusion that when a court cannot try a question except under particular

conditions, or when approached in a particular way, the law withholds jurisdiction, except such conditions exist and the court is approached in the manner provided.

In City of San Antonio vs. Dickman, 34 Tex., 647, that court, in passing upon the question here presented, lays down the rule in the syllabus thus:

"The granting of a new trial reinstates the cause upon the docket as though no trial had been had; and the court has no authority at a subsequent term to entertain a motion to set aside the order granting the new trial.

"When a motion to set aside an order granting a new trial has been improperly sustained at a term subsequent to the making of the order, a motion is legitimate at a term still subsequent to this last order to set it aside and reinstate the same for a new trial."

And in the body of the opinion, the court said:

"In this cause, judgment was rendered at the spring term, 1868, and at the same term a motion for new trial was sustained, and new trial granted; at the spring term, 1869, defendant moved to set aside and vacate the order granting new trial, and the court sustained the motion, and set aside and vacated all proceedings since the rendition of judgment.

"In December, 1870, plaintiff moved to set aside the last order and reinstate the cause upon the docket for a new trial; this motion was overruled by the court, and from this ruling the plaintiff appealed. It is believed to be a well settled principle that the granting of a new trial in a cause is to reinstate it on the docket as though no trial had been had; and the court has no more authority to set aside an order for new trial made at a previous term than it has to strike any other cause from the docket. Such an order or judgment would be a mere nullity. and therefore, under the authority of Gorman vs McFarland (13 Tex., 237), we do not hesitate to say that it was erroneous for the court to entertain the motion of defendant to set aside the granting of a new trial, and the order sustaining the motion is null and void; and the motion of the plaintiff to reinstate the cause upon

the docket was a legitimate and proper motion, and should have been sustained by the court."

In Miller vs. Commonwealth, 13 Penn. State 630, it is said:

"Jurisdiction in courts is the power and authority to declare the law. The very word in its origin imports as much; it is derived from *juris*, and *dico*—I speak by the law. And that sentence ought to be inscribed in living light on every tribunal of criminal power. It is the right of administering justice through the laws, by the means which the law has provided for that purpose. But here the mode and the manner of administering the justice of the country was not provided or prescribed by the law, and is directly prohibited by it. There was, therefore, no jurisdiction."

In the case of Harrigan vs. Gilchrist, 99 N. W. (Wis.) 933, the question is very ably considered and we quote from that opinion:

"A court may have jurisdiction of a particular subject matter, but by settled judicial policy ought not to exercise it. Again, it may, by the settled law, established by its own practice, deemed to be as binding as the written law, have power in a constitutional sense to adjudicate disputed matters of a particular character, acting by recognized unbending principles of procedure, but not jurisdiction to adjudicate such matters in the particular way attempted. In either case it is common to say of an exeessive exercise of authority, that it is without jurisdiction. If the excess has reference to want of power over the subject matter, strictly so-called, the result is void when challenged directly or collaterally. If it has reference merely to the judicial method of the exercise of power, the result is binding upon the parties to the litigation till reversed or set aside in some of the ways appointed by law. The former is usurpation. The latter error of judgment. That rule is said to be universal —to apply to the highest court as well as the lowest. The former cannot render a valid judgment outside of its constitutional authority, while its error within the scope of its authority stands on no higher plane than that of the latter,

except for the fact that there is no tribunal to which an appeal can be taken to correct it."

* * * * * * *

"The matter had not passed beyond the control of the court. It had constitutional authority, or, in other words, jurisdiction over such subjects and of the parties. Was judicial power invoked in a proper way—one which, by settled principles, it was permissible for the court to recognize as legitimate, whether consented to by the adverse party or not? If that must be answered in the negative, then, irrespective of whether the question was suggested for consideration by appellants, and although the judgment entered may be binding as long as it stands, the trial court obtained no jurisdiction of the subject matter of the litigation and its decree must be reversed on that ground.

* * * * * * *

"Where the Circuit Court possesses jurisdiction in the broad sense of thc term, but ought not to exercise it in the way invoked, or at all in the given circumstances, it should be deemed, to all intents and purposes, except in the sense of want of power so called, to be without jurisdiction where it ought, regardless of the atitude of the parties, to decline to act, it should be deemed, regardless of such attitude, not to have jurisdiction to act."

* * * * * * *

"But, as before indicated, a departure from established practice may be deemed so important as to be legitimately regarded as jurisdictional error to the extent that, though not available to avoid the judgment as the result of an excess of power, it may be raised by the adverse party for the first time on appeal as a ground for reversal, or the Court may and ought to take notice of it, whether insisted upon by such adverse party or not, and even if such party expressly waives it, and review the judgment upon that ground alone."

* * * * * * *

"All semblance of a definite system would be lost sight of, and the confusion of things would fatally affect the ability of trial courts, and appellate courts as well, to arrive at

the real truth and justice of disputed matters, with due regard to the convenience of litigants and the safeguarding of their rights. In that view the judicial rule should be firmly applied; suggested in Meyer v. Garthwaite and Burnham v. Norton; that while a trial court, though possessing power and jurisdiction in the general sense, ought not, under the circumstances, to exercise it, such exercise, whether by consent of the parties or not, is to be deemed, for the purposes of a reversal upon an appeal, akin to total want of jurisdiction of the subject matter in the broad sense of the term."

In the case of *ex parte* Lange, 18 Wall 163, the Court sentenced a prisoner to a fine and imprisonment under a statute authorizing either a fine or imprisonment. Said the Court:

"A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinction between void and merely voidable judgments are very nice, and they may fall under one class or the other, as they are regarded for different purposes."

* * * * * * *

"It by no means follows that these two facts make valid' however erroneous it may be, any judgment the Court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or, if on an indictment for treason the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court and forbidden by the Constitution.

"A case directly in point is that of Bigelow v. Forrest. In that case, under the confiscation acts of Congress, certain lands of French Forrest had been condemned and sold, and

Bigelow became the holder of the title conveyed by those proceedings. After Forrest's death his son and heir brought suit to recover the lands, and contended that under the joint resolution of Congress, which declared that condemnation under that act should not be held to work a forfeiture of the real estate of the offender beyond his natural life, the title of Bigelow terminated with the death of the elder Forrest.

"In opposition to this it was argued that the decree of the court confiscating the property in terms ordered all the estate of the said Forrest to be sold, and that though this part of the decree might be erroneous, it was not void. Here was a case of a proceeding *in rem.* where the property was within the power of the court and its authority to confiscate and sell under the statute beyond question; but the extent of that power was limited by the statute. The analogy to the case before us seems almost perfect. In that case the court said: 'It is argued, however, on behalf of the plaintiff in error that the decree of confiscation of the District Court of the United States is conclusive, that the entire right, title and interest of French Forrest was condemned and ordered to be sold; and that as his interest was a fee simple, that entire fee was confiscated and sold. Doubtless, a decree of court having jurisdiction to make the decree cannot be impeached collaterally, but under the act of Congress the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction.' The doctrine of that case is reaffirmed in the case of Day v. Micou, at the present term, where it is said that in Bigelow v. Forrest, 'We also determined that nothing more was within the jurisdiction or judicial power of the District Court (than the life estate), and that consequently, a decree condemning the fee could have no greater effect than to subject the life estate to sale.'"

"But why could it not? Not because it wanted jurisdiction of the property or of the offence, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of a judgment, operative upon the same property, it rendered one which in-

cluded that which it had a right to render and something more, and this excess was held simply void. The case before us is stronger than that, for, unless our reasoning has been entirely at fault, the court in the present case could render no judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain."

Further quoting from Windsor v. McVeigh, supra:

"The doctrine invoked by counsel, that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous cannot be collaterally assailed is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of action, such as civil or criminal; or to particular modes of administering relief.

* * * *

"So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with a felony, upon conviction by the court without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

"The doctrine stated by counsel is only correct when the court proceeds after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment, the law which is applicable to it."

The Oklahoma Statute says "Thereupon the judgment shall be vacated, and the cause shall stand for trial at the next term." If the court after setting the judgment aside and granting a new trial can thereafter set aside the

order granting the new trial, and re-instate the judgment, thus denying to the party entitled thereto the right of a second trial, the court can do by indirect means, that which the statute positively forbids. If the court has the power to do this in one case, it has the power to do so in all cases, and by merely granting a new trial, and then setting that order aside, the court can defeat the purpose of the statute in every case. We submit that the court has not the power to do this. That when the judgment has been set aside, it is a nullity—not dormant merely, but dead,—and the court is without jurisdiction under the statute to re-instate it. The court can no more re-instate a judgment in such a case, over the objection of the party entitled to a second trial, than it can render judgment in the first instauce without a trial, and without giving the parties a chance to be heard. It is like summoning a party into court, and after he has appeared and filed his answer, then strike out his answer and pronounce judgment against him, without a hearing, and without a chance to be heard. It is saying to a party, appear and you shall be heard, and when he has appeared, saying your appearance will not be recognized and you shall not be heard. The trial court in effect said this. The plaintiff in error went into the trial of the cause, relying upon the statutory right of a second trial, and, as is usual in this class of cases, doubtless, failed to produce all the evidence relied upon to defeat the action. Under these circumstances, the refusal to allow a second trial, whether that refusal was direct in the first instance, or by the indirect means of first granting a motion for a new trial, and then setting the order for a new trial aside, is a denial of a substantial right,–a right granted by statute, and goes to the foundation of the claim in litigation. The principle here involved, lies at the foundation of all well-ordered systems of jurisprudence. Everyone has a right to defend when he is assailed in his person or property, for the liability and the right are inseparable. It is a principle of natural justice, recognized as such

by the common intelligence and conscience of all man-kind. A judgment pronounced by a court against a party without hearing him, or giving him a chance to be heard, is not a judicial determination of his rights, and is void, and may be attacked collaterally in the appellate tribunal.

In Edwards v. Edwards, 22 Ill. 121, it is said, quoting from the syllabus:

"The award of a new trial in a first ejectment suit, wipes out the verdict; no judgment can be rendered on it, nor is it a bar to any proceeding."

In the opinion, the doctrine is further announced, as follows:

"The award of a new trial in the first ejectment suit wiped out the verdict, and no judgment was or could be rendered on it. It is not a bar to anything. It might well happen that a plaintiff with a perfect title might fail in his suit by failing to prove possession by defendant at the time of suit brought, and a verdict passed for defendant. In such case, or in any case, if the verdict be set aside, it could not bar another action.

"Setting aside the verdict is as if it had never been used anywhere for any purpose. Followed by a voluntary nonsuit, the whole action and all its parts are null and void."

In Cook v. Calumet & C. Canal & Dock Co., 23 N. E. (Ill.) 629, it is said that an order granting a statutory new trial in ejectment is a final judgment and determination of the issues involved therein, and cannot be set aside.

To the same effect is the case of Indiana B. & W. Railway Co. vs. McBroom, 2 N. E. (Ind.) 760.

In conclusion on this point we assert:

First: That the order of the trial court of April 29, 1901, reinstating the judgment of the court of July 7, 1900, was null and void, because the court did not have the jurisdictional power to make such order; that when the judgment of July 7, 1900, was set aside and a new trial ordered,

and the cause continued for the term, the court did not have jurisdiction at that term, or at any subsequent term, to reinstate that judgment without a trial and without giving the plaintiff in error a chance to be heard; that after the judgment of July 7, 1900, had been set aside as aforesaid, the court had no more right, or power, or jurisdiction to reinstate that judgment without a trial than it had in the first instance to render a judgment without a trial and without giving the defendant a chance to be heard; that the order of April 29, 1901, reinstating the judgment of July 7, 1900, being null and void, every step thereafter taken based upon such void order was without jurisdiction and void.

Second: We contend, further that the order of April 29, 1901, reinstating the judgment of July 7, 1900, was error that affected the jurisdiction of the court; that said order, in effect, denied to the plaintiff in error the right to be heard in defense—a right guaranteed by statute and by every principle of fairness and natural justice; that the question here presented is jurisdictional and materially affected the foundation of a fundamental right, and, therefore, could not be waived; that this question being jurisdictional, and one that affected a fundamental right, the Supreme Court of the Territory committed material error prejudicial to the substantial rights of the plaintiff in error when it refused to entertain or consider it.

Third: That the question, being a jurisdictional one, and one that affects a fundamental right, and goes to the foundation of a substantial claim, this court, the Supreme Court of the United States, can, and should, consider and decide it. In support of these contentions, in addition to the cases already cited, see

Montana Ry. Co. vs. Warren; 137 U. S., 348-351;
San Pedro, etc. Co. vs. United States, 146 U. S., 120-136;
Jordon Mining Co. vs. Societe Des Moines, 164 U. S.. 261;
Arrington vs. Roach, 42 Ala., 155:
Waller vs. Sulzbache, 38 Ala., 318;
Feagan vs. Kendall, 43 Ala., 628;
Shaw vs. Brown, 42 Miss., 313;
Shanks vs. Carrell, 50 Tex., 17.

FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR.

INCOMPETENT EVIDENCE ADMITTED. JUDGMENT. FINDINGS NO JUDGMENT. RES JUDICATA.

These three assignments of error present the question of the competency of the proof of plaintiff's title as the same was presented to the trial court.

The opinion of the Supreme Court of Oklahoma attempts to answer two objections made to the admission of the so-called judgment rendered in the case of McMaster vs. Townsite Trustees in the District Court of Canadian County, by holding,

First: That the Townsite Trustees were proper parties to the suit by McMaster, and

Second: That what is called a judgment of the District Court of Canadian County in that case, constituted findings of fact binding on the parties in this case. (Opinion, page 67.)

We wish to discuss these in their order. *First, Were the Townsite Trustees proper parties?* The Court bases its determination that they were proper parties, upon two cases. First, that of Cowell vs. Colorado Springs, 100 U. S., 55. We have read this case carefully and are entirely unable to find the quotation set out in the opinion of the court. We can find no such quotation as that contained in the opinion as being taken from Cowell vs. Colorado Springs, in the 100 U. S. Reports. In fact, an examination of that opinion does not disclose that there was any question of *res adjudicata* in that case.

The second case cited in this opinion is that of Kerrison vs. Stewart, 93 U. S., 155. The court, however, in applying that case to the one at bar, entirely failed to make the distinction contained in the following paragraph, immediately preceding the sentence quoted in the court's opinion, which is as follows:

"It can not be doubted, that, under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as what is done by him. The difficulty lies in ascertaining whether he occupies such position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust."

It will thus be seen that the opinion of the court on this important phase of this case is based upon a decision of this court, which, in our opinion, has no application whatever to the case at bar, and which also shows that it is applicable to an entirely different class of cases to the one at bar, and it ought not to be necessary to review cases upon this question to determine whether the Townsite Trustees were proper parties in an action to determine whether private in-

dividuals or beneficiaries under the townsite act are necessary parties to an action concerning the disposition of the trust lands, because not only the Supreme Court of the Territory of Oklahoma, but this court, had decided this question before the opinion of the Supreme Court of Oklahoma was rendered in this case.

In the case of Bockfinger vs. Foster, 10 Oklahoma, 488, it was squarely held that in an action to declare a resulting trust under the act of May 14, 1890, the one in question here, the trustees were not proper parties, and that the town lot claimants are necessary parties to the action. That case was taken on appeal to this court and affirmed. Bockfinger vs. Foster, 190 U. S., 116-120. There the court said:

"The decisive question in the case is whether the plaintiff's claim to the land can be made the subject of a suit against the Townsite Trustees as such. Upon a careful scrutiny of the provisions of the Act of 1890, we are of the opinion that this question must be answered in the negative.

* * * * * *

"That the title was so held by the Townsite Trustees is, we think, clear. They did not hold an indefeasible title as of private right, with power to dispose of the land at will, but only as trustees for such occupants as should be ascertained, in the mode prescribed by the Act of Congress, to be entitled to particular lots within the townsite boundary. The trust was not, in any sense, of a permanent character. Its creation by Congress was only a step towards the ultimate transmission of the title of the United States to occupants under the Township (meaning Townsite) act. The United States retained its hold on the land until the title by proper conveyances should pass absolutely from it or from its officers or agents, the Townsite Trustees, to such occupants.

* * * * * *

"Under the Act of Congress, the title remained, in every essential sense in the United States until conveyed to the

occupant. The United States as the primary owner of the land could prescribe the terms upon which it could be disposed of to occupants. A suit against the Townsite Trustees to compel them, without regard to the Act of Congress, to convey to one who was not an occupant within the meaning of that act, was a suit to compel them to convey land which really belonged to the United States.

* * * * * * *

"By the scheme of this Act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the government until the rightful claimants and the undisposed of or surplus lands are ascertained."

It seems to us that under the decisions of the Supreme Court of Oklahoma, and of this high court in the Bockfinger case, it is wasting time to discuss this question as to whether or not the Trustees were proper parties to an action by McMaster to recover any part of the lands to which title was acquired under the Act of May 14th, 1890, and it is particularly useless to weigh, or attempt to weigh, against this decision in the Bockfinger case, cases which do not involve a similar question under a similar act. The Bockfinger case is under this very act, and therefore must be conclusive.

Second: The court attempts to answer the second objection to the introduction of the so-called judgment of the District Court of Canadian County, by holding that that record constituted "The findings and judgment of the District Court of Canadian County." This, we think, is equally untenable with the court's first position with reference to parties. The record shows clearly that what was done by Judge Burford in Canadian County constituted nothing but findings of fact, and the order that was made in this case in Kingfisher County, we claim, was entirely without jurisdiction because the District Court of Kingfisher County could not render a judgment in an action pending in the District Court of Canadian County.

Under the issues joined in this case it was necessary for the defendant in error, who was the plaintiff before the trial court to prove that he was the ower and entitled to the possession of the real estate in controversy. Without competent and sufficient evidence of these allegations, the defendant in error could not recover. The only evidence on this point adduced or offered on the trial was the exemplification of records, and contained in Exhibits "B" and "C" (pp. 36 and 38 of record), the facts from which are found in the court's opinion (pp. 66, 67, 68). These exhibits, which are embraced by reference and findings of facts stated in the court's opinion, are what purport to be the findings of facts of the District Court of Canadian County, and an order or judgment of the District Court of Kingfisher County, Oklahoma Territory, in a former suit between the defendant in error and the Board of Townsite Trustees of the city of Oklahoma City, and are as follows:

"EXHIBIT B.

"In the District Court, 2nd Judicial District, County of Candian, Territory of Oklahoma.

Frank McMaster

vs.

Townsite Trustees.

Frank McMaster, Plaintiff,

vs.

Edgar N. Sweet, Levi E. Coe, David H. Hammons, Defendants.

This case coming on to be heard before the Hon. J. H. Burford, judge of said court, on the pleadings and evidence herein, the court finds that the defendants were trustees of the townsite of Oklahoma City, in said county for the benefit of the actual occupants thereof under the Act of Congress approved May 14, 1890.

That on the 3d of September, 1890, said trustees entered at the land office of the United States at Oklahoma City, O.

T., the S. E. ¼ Sec. 33, twp. 12 N, range 3 west of the Indian Meridian, in trust for the use and benefit of the occupants thereof, and that a patent has been issued to said trustees for said land, to be conveyed by them to the occupants thereof as their several interests should appear at the date of said entry.

That said tract of land was on the 22d day of April, 1889, open to settlement under the act of Congress approved March 2nd, 1889, and that such tract of land was settled upon and occupied as a townsite shortly after noon of said day, and has continued to be and is now held and occupied.

That a portion of the occupants of said tract on said 22nd day of April, 1889, agreed tacitly to the plat of said tract of land, conveying lots, blocks, streets and alleys, and that the plaintiff herein on said day legally entered upon and occupied and has since contined to claim the piece or parcel of ground particularly described in the complaint as his lots.

That said piece or parcel of ground at that time was lots 1 and 2 in block 24, according to the plat so agreed upon. That the Exhibit A attached to the complaint is a correct copy of said plat.

That subsequently to such occupancy and prior to the conveyance to said trustees a different plat and arrangement of the streets, blocks, lots and alleys was adopted and enforced by the parties occupying the said townsite.

That by such plat the parcel of land claimed by the plaintiff was thrown into the street called Grand Avenue. The plaintiff did not consent but objected to said second plat, and has never consented thoreto or acquiesced.

That said tract of land is described as follows, according to the said last-named plat: Commencing at a point on the S. E. corner of block 23, according to the present plat and running southerly on a line with the west line of Broadway thirty-three and 10-100 feet from said southeast corner of said block 23, thence west from said west line of Broadway 140 feet, thence south fifty feet, thence east 140 feet, and thence north 50 feet to the place of beginning.

That thereafter he was by parties organized by said authorities forcibly removed from said parcel of ground and has since that time been forcibly kept from the occupancy of said tract.

That on the 21st day of April, 1891, this plaintiff applied to said defendants as such trustees for deed to said lot, but said trustees found the fact substantially as above stated, but declined to award him a deed for said lot or any part thereof.

That said city of Okaholma City has appropriated said lots to his own purpose as a street and so appropriated the same long prior to the conveyance of said tract by the United States to said trustees.

That C. G. Jones, A. C. Scott and Moses Neal are the successors in said trust of said defendants.

That said plaintiff was not an occupant of said tract of ground at the time the United States conveyed the same to the defendants as trustees, but said portion of said tract was at the time used and occupied as street by said city.

JNO. H. BURFORD, Judge."

EXHIBIT "C."

In the District Court, Canadian County, Second Judicial District, Oklahoma Territory.

Frank McMaster
vs.
Edgar N. Sweet, Levi E. Coe and David H. Hammons, Townsite Trustees, Board No. 2, and their successors.

"On motion in this case on the 13th day of October, 1893, being one of the regular days of said court at Kingfisher, in Kingfisher County, in open court, the same being in session, the following proceedings were had:

It is ordered herein that said defendants make, execute and deliver to Frank McMaster, plaintiff herein, a trustee's deed as decreed by this court, on the 14th day of November, 1892, of the following described premises and real estate, to-wit: Commencing at a point on the southeast corner of block (23) twenty-three as shown by the trustee's plat of Oklahoma City, O.T., running thence southerly on a straight line with the west line of Broadway as shown by said trustt ee's plat thirty-three and ten-one-hundredths (33 10-100) feet from said southeast corner of the block aforesaid to the place of beginning, thence west one hundred forty feet (140),

thence south at right angles with the line aforesaid fifty (50) feet, thence east parallel with the aforesaid east and west street line one hundred and forty (140) feet, thence north to the place of beginning, fifty (50) feet. Provided, however, that the said plaintiff shall fully —— all costs of said trustees in the making of the deed herein ordered.

In witness whereof I have hereunto set my hand and caused the seal of said court to be affixed this 13th day of October, 1893.

JOHN H. BURFORD, Judge."

That said suit was brought in Oklahoma County, and taken to Canadian County on a change of venue, where a trial was had, and the court on May.... 1892, made a finding of facts, a copy of which was put in evidence as Exhibit "B" (p. 36) and found by the Oklahoma Supreme Court, (pages 66-67-68). Upon this finding of facts no judgment was ever rendered, unless it can be said that the order of which Exhibit "C" is a copy, was such a judgment. This order, Exhibit "C" purports to be a judgment of the District Court of Canadian County, Oklahoma, rendered while the court was in session in Kingfisher County. The record is entirely silent as to how the case came before the District Court in Kingfisher County. There is no evidence in the record of any change of venue or order of the court for a change of venue to that county. The only semblance of authority for the rendition of a judgment by the District Court of Kingfisher County, is the fact that the same person, Hon. Jno. H. Burford, was the presiding Judge of both courts, and as the order recites that it is in a cause pending in the District Court of Canadian County, it should, therefore, be so taken and treated and as such must be void, because the District Court of one county cannot render a judgment in an action pending in the District Court of another county.

It is a well established rule of law, that the findings of a court as to the facts of a case upon which no judgment

has been rendered, do not constitute evidence in another action of the facts so found.

In the case of Child vs. Morgan, 52 N. W. (Minn.) 1127, the court says:

"The evidence on the part of the defendants was insufficient to establish the liens asserted by them. The evidence consisted only of the pleadings in a former action, and the findings of the court in the trial thereof, embracing the order of the court for the entry of judgment in accordance with the conclusions of law expressed: That was an action prosecuted by the defendant Morgan against some or all of these defendants, with others, to foreclose mechanics liens on this property. The findings of the court, thus introduced in evidence in this action, set forth the fact showing the existence of such liens and as legal conclusions therefrom it was declared that the several lienors named were entitled to a judgment as therein specified, and it ordered that a judgment be entered accordingly. No judgment, appears, however, to have been in fact entered. The findings of the court and order for judgment did not constitute a judgment, and they were not intended as such. They did not finally determine, as a judgment does, the matters in issue. The entry of a formal judgment, which should constitute a final adjudication, was contemplated and directed; but no such judgment was entered. These findings were as inconclusive as the verdict of a jury, which, without judgment thereon, has not the effect of an adjudication, (Schurmeier v. Johnson, 10, Minn., 319, Gil. 250,) and is not admissible in evidence. (Pitton v. Walter, 1, Strange, 162,) and so of a report of a master in chancery, (Nash v. Hunt, 116 Mass, 237). Judgment would not necessarily be entered on the findings and order, any more than on a verdict of a jury. A new trial might be awarded and no judgment ever be entered. Under our statutes, appeals will lie from judgments, and from orders involving the merits of the action but, as has often been held, such findings of a court, and orders for judgment are not appealable, either as judgments or as orders involving or determining the merits of the action. Von Glahn v. Sommer, 11 Minn., 203, (Gil. 132) Ryan v. Krantz, 25 Minn. 362, and cases cited; Shep-

ard v. Petit. 30 Minn. 119, 14 N. W. Rep. 511. Since the findings and order did not constitute an adjudication in favor of the lien claimants, they were not competent as evidence in this action to prove the liens asserted by them. Auld v. Smith, 23 Kansas, 65. This was not, of course, primary evidence of the furnishing of materials or labor,—of the facts from which liens arise,—and, if not an adjudication of such facts between the parties hereto, (or privies) we know of no rule of evidence which would permit proof of such facts to be made by presenting the inconclusive findings of the court in another cause."

The Supreme Court of Kansas declares that only a final determination upon the merits can be considered as an adjudication amounting to res adjudicata, and that findings of a court as to the facts can be considered such only in cases where they themselves are final, or in cases where a final judgment is afterwards rendered upon them, sustaining and confirming them. Upon this subject the case of Auld v. Smith, 23 Kansas. 65, the court says :

"It will be perceived that we have no evidence sustaining or supporting the findings made or judgment rendered in this case, except the findings made in said previous case, which findings are themselves not sustained or supported by any judgment rendered thereon, or confirming the same. Of course we now have reference to those findings made in the first case, showing that the defendants collected rents $470.75, in excess of the moneys which they paid out for taxes, and to those findings only. No judgment was rendered in that case for the said sum of $470.75, or any part thereof, or concerning the same, except the judgment dismissing the plaintiff's claim therefor. Now are said unsupported and unconfirmed findings any evidence in this case? We think not. Certainly they are not original evidence of the facts set forth therein, or of the facts which they were introduced to prove. Neither are they admissions made by the defendants, for the defendants took exceptions to them at the very time that they were made, and promptly moved to set them aside, and have never admitted their truth or correctness; and it cannot be said that they are adjudications

between the parties amounting to res adjudicata, for nothing but final determinations upon the merits are exalted to the preeminent distinction. (Freeman on Judgments Sec. 251; 2 Wharton's Evidence, Sec. 781, and cases cited.) Indeed, they cannot be considered as evidence against the defendants under any rule of evidence with which we are acquainted. Final judgments are of course adjudications; and findings of courts and verdicts of juries, and reports of commissioners or referees, may also sometimes be considered as adjudications, but they can be considered such only in cases where they themselves are final, or in cases where a final judgment has afterward been rendered upon them sustaining and confirming them, and even when confirmed by a final judgment they are adjudications only so far as they are necessarily included in and become a part of such judgment. A finding or verdict partially sustained by a judgment and partially not, is an adjudication or evidence in a subsequent suit, only so far as it is sustained by the judgment. A thing contained in the finding or verdict, but not included in or confirmed by the judgment, cannot be considered as an adjudication or used as evidence unless some other ground can be found for its use than merely that it is contained in such finding or verdict. We would refer to the following as among the authorities which we think tend to sustain the foregoing propositions.: Donaldson vs. Judge, 2 Bibb (Ky.) 57; McReady v. Rogers, 1 Neb. 124; Hawks vs Trusdell, 99 Mass. 557; Nash v. Hunt, 116 Mass. 237; Fisk v. Parker 14 La. An. 496; Whitaker v. Bramson, 2 Paine; 209; United States v. Addison, 73 U. S. (6 Wall) 292; Ridgely vs. Spencer, 2 Binney (Pa.) 70; Collins, v. Freas, 77 Pa. St. 493, 497."

In Massing v. Ames, 36 Wis. 409, the Court states the rule thus:

"Action to restrain the sale of plaintiff's lots for the taxes of a certain year, and set aside such taxes as illegal. The Court filed its findings of fact and conclusions of law, holding (in substance) that certain of the taxes were valid, and the remainder void, and that upon payment of the former within thirty days, plaintiff would be entitled to the relief demanded in the complaint in respect to all the lots affected by such void taxes, and that upon failure to make

such payment, the complaint should be dismissed; that the plaintiff, in any case, should pay the costs; and that there snould be 'judgment accordingly'. Thereupon one of the parties caused a paper to be drawn up reciting the findings of facts and conclusions of law, and adjudging in accordance therewith; and this was signed by the clerk and entered as a judgment. Held, on appeal therefrom as from a judgment.

(1) That the paper so entered was not a judgment, as it did not finally determine the rights of the parties.

(2) That it was wholly unnecessary as an order, adding nothing to the findings of fact and conclusions of law.

(3) That it must therefor be regarded as a nullity."

To the same effect is the case of Taylor, Shipton & Co., vs. Runyan, & Brown. 3 Iowa, 474, 480, in which the court says:

"When we speak of a judgment under our law, in its broadest sense, we mean all final adjudications of civil actions. Code Sec. 1814. At common law; this judgment is the sentence of the law, pronounced by the court upon the matters contained in the record of an action before it. When we speak of a final judgment, therefore, we understand it to be, the application of the law by the court, to the particular case before it, and specifically granting or denying the remedy sought by the action, 3 Black Com. 395. And the same author speaks of the judgment as "the remedy prescribed by the law for redress of injuries, and the suit or action as the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study, to point out, and therefore the style of the judgment is not, that it is decreed, or resolved by the court, for then the judgment might appear to be their own; but, 'it is considered' *consideratum est per curiam*—that the plaintiff do recover his damages, his debt, his posession, or the like, which implies that this judgment is none of their own; but the act of the law pronounced and delivered by the court, after due deliberation and inquiry. In general, the nature of the judgment is intimated or stated by the court, and the clerk enters it on the minutes in due form."

In Whitewell v. Hoover, 3 Mich page 84, the court says: (page 88)

"Before this amendment was made, there was clearly no final judgment entered in the cause. The entry showed nothing but the fact of interlocutory judgment, the order of reference to the clerk, and his action. It is true that it bears upon its face evidence of an omission of something but what was omitted could only have been inferentially determined. From the subsequent action of the court, it would seem that the omission was thought to embrace the assessment of the amount due upon the bond, and that which it was conceived went to constitute a judgment, viz: the words 'ordered final judgment for', and without which there was no evidence of an adjudication by the court.

"A judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it, and it is only evinced by a record, or that which is by law,—as the files and journal entries of this State—substituted in its stead. An order for a judgment is not the judgment, nor does the entry of such order partake of the nature and qualities of a judgment record. This must clearly ascertain not only the determination of the court upon the subject submitted, but the parties in favor of and against whom it operates. Such is held to be the rule even in cases of judgments in Justices' Courts, and certainly it may not be relaxed in Courts of Record."

In Lincoln v. Cross, 11 Wis. 94, the court states the rule in the syllabus thus:

"An order in these words, 'Ordered judgment in this action' etc., is not a judgment, although signed by the judge, and will not justify the issuing of an execution. (Dean v. Williams, 1 Chand., 22; Wheeler v. Scott, 3 Wis., 362; Rape v. Heaton, 9 id., 328. Remington v. Cummings, 5 id, 138; Wadsworth v. Willard, 22 id., 238; and see Potter v. Eaton, 26 id., 382.)"

If the foregoing authorities correctly state the law, and we think they do, we may confidently assert that the findings of fact shown in Exhibit B, were erroneously admitted in evidence at the trial of the case.

The Organic Act of the Territory of Oklahoma recognizes a manifest distinction between the civil jurisdiction which it vests *ex pro-prio vi-gorie*, in the District Courts, and that which it does not specifically confer. The language of the Act clearly shows the design of Congress that the original civil jurisdiction of these courts should be subject to legislative control. Section 9 of that Act creates the various courts of the Territory, and declarse that the jurisdiction of these courts " shall be as limited by law". So far as the Organic Act itself operates as a specific grant of Territorial legislation, it is manifest that the original jurisdiction of the District Court is limited to the county for which the court is established, and in which it is held; and all the clauses of that Act, taken together, clearly indicate a design that the District Court in each county shall be a County Court, with jurisdiction, civil and criminal, limited to the county. Section 9 of that Act provides that :

"Said Territory shall be divided into three (now seven) judicial districts, and a District Court shall be held in each county in said district thereof by one of the Justices of the Supreme Court, at such time and place as may be prescribed by law, and each judge after assignment shall reside in the district to which he is assigned. The Supreme Court shall define said judicial districts, and shall fix the times and places at each county seat in said district, where the District Court shall be held and designate the judge who shall preside therein."

The legislative and judicial history of the Territory, show that this has been, from the beginning, the construction put upon the Organic Act by the profession and by the people. All the statutory law of the territory has been enacted in harmony with this idea. The Code of Civil Procedure limits the civil jurisdiction of the District Court to its own county; and is only under some positive statutory provision that mesne process can go to other counties.

The clause " as decreed by this court on the 24th day of November, 1902", page 38, evidently refers to some decree

of the District Court of Kingfisher County, but the record does not contain any such decree.

Furthermore the order of the District Court of Kingfisher County, Exhibit "C", shows upon its face that the court rendering that order did not have jurisdiction. The court in Kingfisher County had no jurisdiction to make such an order in a case pending in the District Court of Canadian County. That order purports to be an order or judgment of the court, and not an order of the judge, and the record and findings thus show want of jurisdiction in the District Court of Kingfisher County to make such an order in a case pending in the District Court of Canadian County. The law is that where the record affimatively shows a defect of jurisdiction, the judgment, even by a superior court, may always, both at home, and abroad, be attacked collaterally. This is true whether the jurisdictional defect is one which arises from a mistake in going beyond the scope of the law by the court, or is due to a failure to obtain jurisdiction of the cause or of the person of the defendant.

Smith's Leading cases, Vol. 2, pages 1017-1018.
Webster vs. Reid, 11 Howard, 437;
Thatcher vs. Powell, 6, Wheaton, 119;
Dicks vs. Hatch, 10 Iowa, 384;
Brown on Jurisdicton, 2nd Edition, section 34.

From what appears above, it can hardly be questioned that the order entered in the District Court of Kingfisher County upon the findings rendered in the District Court of Canadian County, is a nullity and utterly void. This being true, said order rendered in the District Court of Kingfisher County in the case of McMaster against the townsite trustees pending in Canadian County, could not operate as res adjudicata in this case against the City of Oklahoma City.

Sec. 5, page 717, Vol. 24, Am. & Eng. Ency. of Law, 2nd Ed;
Masterman vs. Masterman, (Kas.) 51 Pac. 277;
Gordon vs. Kennedy, et al., 36 Iowa, 167;
Zalesky vs. State Insurance Co. (Iowa) 70 N. W. 187.

In the Am. and Eng. Ency. of Law, *supra*, it is said:

"If, however, the court acted without authority in the premises, its decision is not merely voidable, but void, and affords no protection to those claiming or acting under it, and cannot successfully be set up as *res adjudicata*, against objection, in an action, whether upon the same, or a different cause of action."

RES ADJUDICATA OF FINDINGS IN McMASTER CASE AGAINST TOWNSITE TRUSTEES.

But even if McMaster, as an alleged occupant under this townsite act, could have maintained an action against the townsite trustees which this court has held, in the Bockfinger case, could not be done, then we contend the findings of fact in that case were not binding on the City of Oklahoma City, and that the Supreme Court of Oklahoma erred in so holding in its decision (pp. 66-67). If it had been the desire of McMaster to bind Oklahoma City in any subsequent action against it, the municipality, at the time incorporated, should have been made a party in the case of McMaster vs. Townsite Trustees. That the City of Oklahoma City then existed is beyond controversy, for the Supreme Court of Oklahoma finds (page 68) that "the land claimed by plaintiff was thrown into the street, in Grand avenue," and "THAT SAID CITY OF OKLAHOMA CITY HAS APPROPRIATED SAID LOTS TO ITS OWN PURPOSES AS A STREET, AND HAD APPROPRIATED THE SAME PRIOR TO THE CONVEYANCE OF SAID TRACT BY THE UNITED STATES TO SAID TRUSTEES;" and "that said plaintiff (McMaster) was not occupying said tract of ground at the time the United States conveyed the same to the defendants as trustees, but said portion of said tract was at the time used and treated as a street of said city."

It thus appears that it was long after its dedication to public uses and after its acceptance and use by the public that McMaster applied to the trustees for a deed, which they declined to make. Thereupon he brought his action against the trustees after the trustees had dedicated the land to public uses, and without making Oklahoma City a party to that action. It is under this statement of facts that the Supreme Court of Oklahoma holds that the findings of fact made by Judge Burford in the case pending in the District Court of Canadian County were "binding and conclusive upon not only the parties (meaning the trustees), but all persons claiming title under or through them."

This declaration of law as applied to the facts of this case, we claim was erroneous, not only upon the grounds above given, but also because Oklahoma City had acquired no interest after the findings made in the District Court of Canadian County or the order made in the District Court of Kingfisher County in such cause pending in the District Court of Canadian County.

Its interests in its public streets attached before those events, and they were not bound by that finding or order. This rule is well established. In Black on Judgments, 2nd addition, section 549, the rule is stated in the following language:

"Privies in such sense that they are bound by judgment, are those who acquired an interest in the subject matter after the rendition of the judgment. If their title of interest attached before that event, they are not bound unless made parties."

It seems to us, therefore, that those findings made in the case brought against the Townsite Trustees, and in which the City of Oklahoma City was not a party, long after this land had been placed in the street of Oklahoma City by a plat and arrangement of the streets, alleys, lots and blocks adopted and enforced by the people occupying

said townsite, and after the people upon the townsite, had enforced such plat and removed McMaster therefrom, as found by the Supreme Court of Oklahoma, and after Congress had recognized the acts of those people, as was done by the enactment of section 2 of the Act of May 14, 1890, under which these trustees were appointed (Supp. Rev. St. U. S., Vol. 1, 740). and after the trustees had approved the plat of this townsite, thus dedicating this land then and theretofore in the street to the public as a street, as the Supreme Court of Oklahoma also found, can not be held to be *res adjudicata* in an action brought against the City of Oklahoma City. These findings, we therefore claim, cannot be considered, and should not have been considered by the Supreme Court of Oklahoma, to establish any right in McMaster to the ground sued for.

We think there can be no reasonable doubt that the Supreme Court of Oklahoma is wrong upon both its answers to the objections to the introduction of these findings, the facts relating to which the opinion recites, and that the record in the case of McMaster against the Townsite Trustees was not competent evidence in this ejectment suit against the City of Oklahoma City, and the City of Oklahoma City can in no way be bound thereby, and of course, if this is true, then there are no facts whatever to show that McMaster has any title or ownership in this land, and this would dispose of the case without consideration of the other questions.

SEVENTH, EIGHTH, NINTH, TENTH, ELEVENTH AND TWELFTH ASSIGNMENTS OF ERROR.

DID McMASTER ACQUIRE A VESTED RIGHT IN THIS GROUND IN THE STREET OF OKLAHOMA CITY?

These assignments of error present, and under them we wish to discuss the real question involved in this controversy between the city of Oklahoma City and Frank Mc-

Master; for, if he had no vested right in this ground prior to the time it was dedicated by the plat made by the Townsite Trustees, and which plat is shown in the record and found in the opinion of the court, and which plat placed this ground in Grand avenue, a street of the city of Oklahoma City, and where it had been placed by the plat made by the people who located upon the townsite when they came to finally determine where the streets should be, as the Supreme Court of Oklahoma also finds, upon which should be located lots which, under the townsite act in question, and lots only, could be acquired by the occupants of the said townsite, then certainly McMaster is not entitled to recover this property and close up said street and eject the city authorities therefrom.

Even if this court should treat the findings of fact made by Judge Burford in the McMaster case against the trustees in Canadian County and the order made thereon in the District Court of Kingfisher County as the facts upon which to determine McMaster's claim to this land in the street, then under these facts McMaster is not entitled to recover this land. Those findings and that order certainly could not have more force and effect than if the order had been carried into full operation and had been complied with by the trustees, giving to McMaster a trustees' deed to this land, which had previously by the trustees been platted into a street. In other words, if these findings and this order, which are made so much of by the Supreme Court in the discussion of this case, had been fully carried out by making a deed to this ground to McMaster, then the case would be presented upon its merits under the facts as found by the Supreme Court of Oklahoma, with a plat made by the townsite trustees in September, 1890, platting this ground into a street in Oklahoma City and a deed therefor made to McMaster by the trnstees for a part of this street; and this would present the real question of merit in controversy between these two litigants under the assignment here made.

We wish to discuss these assignments under two heads, (1) The cases cited and referred to by the Supreme Court of Oklahoma in support of its opinion on this point; and (2) The Beamer case, decided some years ago by the Supreme Court of Oklahoma Territory.

CASES CITED BY OKLAHOMA SUPREME COURT.

The cases cited in the opinion of the Supreme Court of Oklahoma on the question of the alleged vested right of McMaster have no application whatever to this case, and the error in the argument in the opinion lies in the assumption that "the defendant in error herein (McMaster) had legally entered upon said tract of land, and was occupying it in accordance with the rules and regulations of the Land Department." Now, there were not only no rules and regulations of the Land Department for McMaster's occupancy of this ground when and while he occupied it, but there was not then even any law of Congress providing for such regulations. His occupancy was on April 22, 1889. It was more than a year after that time before the act providing for the acquiring of title, and under which the regulations of the Secretary of the Interior were made, was passed, and that law and these regulations providing for the platting of this land and the creation of streets, as before suggested, necessarily contemplated that the land platted into streets should vest in the public and for the public use, and not in an individual.

The case of Sturr vs. Beck, 133 U. S., 541, cited in the opinion of the Supreme Court, is a case of a homestead entry, and the quotation made from that case in the court's opinion is the granting clause of the homestead law, with the ruling of the Land Department with reference thereto.

The case of Witherspoon vs. Duncan, 4 Wallace 210, is a case of an entry made at a land office, and a certificate of donation entry issued.

The case of Burlington & S. W. R. Co. vs. Johnson, (Kan.) 16 Pac. 125, is a case where a railroad company took its right of way out of land covered by a homestead entry. The distinction between cases of this character under the homestead law, and other laws vesting the right in the entryman, and this case, where there was no homestead entry, and no law under which, at the time of the occupancy of McMaster, he could ever make an entry or acquire any title to the land occupied, and where the act granting title to the land, when passed, and the regulations thereunder, and the execution of the trust as made by the trustees, placed the land claimed in a public street for public purposes, must be clearly apparent, and, in fact, is clearly shown in the case of Beamer vs. The City of Guthrie.

The case of Cook vs. McCord, 9 Okla. 200, is one where two parties were claimants for a lot (not a street), and a deed was issued to Cook, one of the contestants therefor. That case manifestly cannot be in point here.

The case of Betts vs. Townley, 20 L. D. 425, is cited only with reference to the question of abandonment, which is of no consequence in this controversy, which hinges, of course, upon the question, not of the manner in which McMaster complied with the law with reference to a lot or tract of land to which he could acquire title, but to the question as to whether he could acquire title to a piece of land which went to the public under the grant from the United States under which he must claim title.

The Supreme Court of Oklahoma not only applied the rule which prevails in homestead cases where a vested right is granted under a full and complete act of Congress, entirely different from the legislation of Congress in force in this case at the time of his alleged settlement, April 22, 1889, but the court entirely misconstrued the Act of March 2, 1889, and confuses subsequent regulations of the Land Department. The court, in its opinion on this point, says (p. 68):

"That said tract of land described in said patent to said Trustees was on the 22nd day of April, 1889, opened to settlement under Act of Congress approved March 2, 1889. (C. 412 Sec. 13, 25 Statutes at Large 1005;) * * * Now, this finding of the court shows that at the time that this land was opened for settlement under the Act of Congress the defendant in error had legally entered upon said tract of land and was occupying it, in accordance with the rules and regulations of the Land Department. That being true, we take it *that his interest and rights in said land attached at that time*; that when he had complied with the rules and regulations of the Land Department he was entitled to a deed; * * * His rights must be determined, it seems to us, by the conditions as they existed at the time of his settlement upon these lots, which, according to the findings of the District Court of Canadian County, was on April 22, 1889. * * * If, at that time, he had complied with the law and the rules of the Land Department, and was entitled to a deed, then no subsequent action of the occupying claimants, of the townsite, or the Townsite Trustees, or the City of Oklahoma City, could take away his rights without his consent."

* * * * * * * * *

The trouble with the application of the law to the facts thus is based upon an incorrect premise. Of course, if at the time McMaster made his settlement, April 22, 1889, "he had complied with the laws and the rules of the Land Department and was entitled to a deed" to this ground, then no subsequent action of the Board of Trustees could defeat his right to receive such title. But the trouble with his situation is that he had not complied with the law so as to entitle him to a deed, because there was no law then in existence under which he could possibly obtain a deed, and it required subsequent legislation of Congress, which was enacted on May 14, 1890, in order that he or any other person could get a deed to any part of this townsite. There was no way under the Act of Congress of March 2, 1889, that McMaster or any other person on the Oklahoma City Townsite could get a deed to any part of that townsite. The part referred to of said act reads.

"The Secretary of the Interior may, after said proclamation, and not before, permit entry of said lands for townsites, under section twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes, but no such entry shall embrace more than one-half section of land,"

Now, sections 2387 and 2388 were applicable only in an organized State or Territory, and Oklahoma was neither, and did not become a territory until May 2, 1890. Sections 2387 and 2388 provide the machinery for acquiring title to a townsite where there is an incorporated town or a judge of the county court of the county, of which Oklahoma at that time had neither, because there were no laws providing for local governments here; that is, no laws providing for the incorporation of towns or cities or for theorga nization of counties and were none until the Organic Act was passed May 2, 1890, (Supp. Rev. St. U. S., Vol. 1 720). The rules and regulations of the Land Department relied upon in the court's opinion were also as wanting as the necessary Act of Congress under which McMaster "was entitled to a deed." No rules and regulations were ever made by the Land Department which provided in any way whatever for any persons acquiring a deed to a town lot or any part of a town lot in Oklahoma until after the passage of the Townsite Act of May 14, 1890, and the regulations of the Land Department providing for these deeds were made to carry out the provisions of the Act of May 14, 1890.

The preliminary circular of the Interior Department under this act, appears in 10th Land Decision, page 604, and the extended regulations therein referred to were approved by the Secretary of the Interior on June 18, 1890, and appear in 10th Land Decisions, 666, and a further circular concerning such regulations was made to the trustees of townsites in Oklahoma by the Secretary of the Interior on July 10, 1890, and appears in 11 Land Decisions, 24, and it was under these regulations and not under any regulations

made by the Land Department under the Act of March 2, 1889, that occupants of townsites in Oklahoma obtained deeds to their lots.

The Townsite Trustees performed their functions and their duties under these regulations, but McMaster, under the facts found by the court, had been dispossessed from his settlement, and this ground had been appropriated as a street of Oklahoma City long prior to that time. The entire question, however, of the alleged vested right of a townsite settler is fully covered by the decision of the Supreme Court of Oklahoma in the Beamer case, 3 Okla. 652.

A review of all of the citations of the Supreme Court of Oklahoma in support of its judgment in this case, shows that none of them in any way effect its former opinion in the case of City of Guthrie vs. Beamer, supra, or the higher determination of this court in the Bockfinger case.

THE BEAMER CASE.

The decision of the Supreme Court of Oklahoma, appealed from, upon the facts as set out in that opinion is not only squarely opposed to the Bockfinger case on the question of necessary parties, but it is equally opposed to the decision of the Supreme Court of Oklahama, in the case of the City of Guthrie vs. H. C. Beamer, supra, which goes to the merits of this controversy between McMaster and the City of Oklahoma City. The dissent of Mr. Justice Pancoast in this case is based upon the Beamer case. There is no distinction whatever, of law, that can be drawn between this case and the Beamer case. The only difference between this case and that case is, that in the Beamer case there was a stipulation as to the facts which does not appear in this case, but the court will observe that the Supreme Court of Oklanoma, in the Beamer case, did not by any means confine its consideration of the questions of law involved to the facts as set out in

the stipulation. The court considered the common history of the country, and took judicial knowledge of the essential facts with reference to the opening of a townsite at Guthrie, and the same judicial knowledge could, and should of course be taken in this case concerning the opening of the townsite at Oklahoma City, under the same act of Congress. That the court should recur to the history of the times and conditions under which an act of Congress which is under construction was passed, and take judicial notice of the facts concerning the disposition of public lands, is recognized in the cases of Knight vs. U. S. Land Association, 142 U. S., 161, and Smith vs. Townsend, 148 U. S., 490. And if the court holds against us on the question of the admissibility of of the findings of facts made by Judge Burford in the case against the Townsite Trustees in proof of McMaster's title to this ground in the street, then we say the law, as laid down in the Beamer case, is correct, and should be applied to these findings as they appear in the record and in the opinion of the Supreme Court of Oklahoma, and that these facts so found should be applied to this case and viewed in the light of the common history of the opening of Oklahoma to settlement, April 22, 1889, and the establishment of townsites and the early founding, control and building of cities therein when there was no law for the acquirement of title to the ground on which many permanent and lasting buildings were erected, and streets and alleys of necessity provided therefor, and which at times required the "provisional governments" in those cities to establish streets where settlements had been made. The right to do this was affirmed in the Beamer case, and the case at bar is another like it, and should have been followed in this case, as indicated by Mr. Justice Pancoast in his dissenting opinion.

From this record, it appears (page 36, opinion 66 and 68) that the townsite of Oklahoma City was patented by three townsite trustees under the act of May 14, 1890, and

in these findings of Judge Burford in the case of McMaster against the Trustees in Canadian County, it appears, (page 36 of record) and in the oppinion of the court, page 68, that on April 22nd, 1889, McMaster entered upon and occupied, and has since attempted to claim the piece of ground in controversy; that on April 22, 1889, this ground was a lot in accordance with a plat tacticly agreed upon by the occupants and "that subsequently to such occupancy and prior to the conveyance to said trustees, a different plat and arrangment of the streets, blocks, lots and alleys was adopted and enforced by the parties occupying the said townsite. That by such plat, the parcel of land claimed by the plaintiff was thrown into the street called Grand Avenue. That plaintiff did not consent, but objected to said second plat and has never consented thereto or acquisced."

"That said City of Oklahoma had appropriated said lots to its own purpose as a street and so appropriated the same *long prior to the conveyance of said tract by the United States to said trustees.*"

"That said plaintiff was not an occupant of said tract of ground at the time the United States conveyed the same to the defendants as trustees but said portion of said tract was at the time used and occupied as a street by said city."

These facts are recited at length and referred to by exhibit in the decision from which we appeal and the law as applied therto is therefore now here for review.

Under these findings of fact, which are the basis of the opinion of the Supreme Court of Oklahoma in this case, and which are set out in the opinion of the court, we claim that the case comes squarely within the Beamer case, and that McMaster never acquired a vested interest in this property in Grand Avenue. At the time McMaster settled there, there was no law under which he could acquire title to any part of said tract as a townsite, and it required the Act of May 14, 1890, to give to McMaster as an occupant

of a lot, (if he were an occupant of a lot, much less a street), any right to ever acquire any title thereto, and without the Act of May 14, 1890, he nor any other occupant of that townsite could ever have acquired any title to any portion of it, because there was no law of the United States defining the terms or manner of acquiring title to townsites in Oklahoma. And the Government which provided an act by which these people could acquire title to townsites in Oklahoma could of course prescribe the terms and manner upon which that title might be acquired. These terms are contained in the Townsite Act of May 14, 1890, (Supp. to Rev. St. U. S. Vol. 1, page 739). The first section of that Act provides, among other things.

"And when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees including the survey of the land into streets, alleys, squares, blocks and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof."

It was thus provided as a part of this grant, that the lands of the United States granted in Oklahoma for townsite purposes under this act, should be entered by trustees under regulations of the Secretary of the Interior for the execution of the trust by the Trustees, including the survey of the lands into streets, alleys, blocks and lots, and it was therefore necessarily contemplated that whatever land was surveyed into streets and platted into streets and alleys by the Trustees, whether they approved the existing survey or not, should forever remain streets and alleys and be set aside for the public use, and it was thus necessarily contemplated that no private individual could ever acquire any right thereto. The findings of facts in this case show that this property which McMaster claims was a part of a street, and a part of Grand Avenue which is in fact one of the principal streets in the City of Oklahoma City, and was such a street LONG PRIOR TO THE TIME WHEN

THIS LAND WAS ENTERED BY THE TOWNSITE TRUSTEES. McMaster was not an occupant of the land at the time the land was entered by the trustees, but his dispossession thereof occurred long prior to that time. He could acquire no vested interest in any part of said land until the trustees should survey the land into lots, for it was only lots that a settler could acquire title to. He certainly could acquire no vested title in a public street. The bounty of the Government was not extended to townsite occupants for the purpose of enabling them to acquire title to a street and it was never contemplated that the townsite trustees of any townsite or a city built thereon, should be involved in litigation by a townsite claimant claiming a lot in a street. That it was lots that a settler might make claim for and lots alone, we think is made clear by this court in the Bockfinger case. The syllabus in point reads:

"The Townsite Trustees do not hold an indefeasible title as of private right, with power to dispose of at will, but only as trustees for such occupants as may be ascertained, in the mode prescribed by the act of Congress, to be entitled to particular lots within the townsite boundary."

This whole question, however, has been so fully discussed in the Beamer case, *supra*, and so ably considered that it should be decisive of this case. It is there said:

"One claiming public lands as a homestead, pre-emption or townsite settler acquires no vested interest as against the United States until an entry is made at the proper land office.

* * * * * * * * *

"While it is true that the act of May 14, 1890, provides that the lands occupied for purposes of trade and business shall be entered by the trustees for the use of the occupants thereon, it also contemplates the entry of platted lands, lands that have been or shall by the trustees be platted into lots, blocks, streets and alleys.

"While the act recognizes the rights of settlers and oc-

cupants in so far as the same are consistent with the purposes of the act, it also authorizes the Secretary of the Interior to approve any survey that has already been made by the inhabitants of such town, or to provide by regulations for a survey of the land into lots, blocks, streets and alleys when necessary.

"The power of Congress over the disposition of the public lands is supreme, and so long as the title is in the United States and no entry of the land has been made under any law of the United States, or no rights of settlers or occupants have attached, Congress may make such disposition as the law-making power may declare, although it may work injustice or hardship to claimants for such lands.

* * * * * * * * *

"If the rights of a pre-emption or homestead claimant do not attach to the land as against the United States until the entry of the land is made, then we know of no reason why the settlement or improvement of a townsite occupant will entitle him to any greater or superior rights. And, applying the rule applicable to homestead and pre-emption claimants as announced by Mr. Justice Miller, *supra*, which we think is applicable to the case at bar, Congress had the right and authority to make such disposition of the lands embraced in the Guthrie townsite for streets, alleys and public highways as, in the wisdom of the lawmaking power, seemed proper, and the authority vested in the Secretary of the Interior to adopt a plan and survey already made, carried with it, when such adoption was made, an express dedication of the lands shown on the plats as streets to the public uses and divested all claims of private parties.

* * * * * * * * *

"When the Secretary of the Interior, or the trustees appointed by him, under his instructions adopted and approved the plat of the townsite of Guthrie, which the inhabitants had made long prior to the entry of the land by the trustees, the lands designated as public streets on such plats, were dedicated to the public use, and the act of Congress and the action of the Secretary under the power vested in him by said act, had the effect to divest any individual interest that

might have been asserted to such portion of said land, and Beamer had no rights or interest in the public streets which can be conveyed to him by the trustees.

* * * * * * * * *

"It is a part of the general history of the settlement of the City of Guthrie, that prior to the opening of the country to settlement, on April 22, 1889, and prior to the settlement and occupancy of the lands embraced in the townsite, no plats had been adopted, and no sub-divisions of the lands into lots, blocks and streets had been made, and no valid or legal survey, plat or sub-division could have been made until after the lands were open to settlement. Thousands of people desiring to acquire lots in the projected city went upon the lands now constituting the City of Guthrie, and each for himself undertook to acquire by occupancy or improvement, some particular portion of said tract for his own use. As a natural result there was no order or regularity in such settlements, and everything was chaos and disorder. There was no municipal government and no authority for any. There was no law in the territory at that time by which a municipal government could be formed, and no person had authority to act for the masses. It became necessary to bring order out of chaos, and to settle the many conflicting interests by some general rule or authority that the masses would recognize. 'The very nature of the land settled upon and occupied as a townsite implies the existence of streets, alleys, lots and blocks, and for the possession of the lots and their convenient use and enjoyment there must of necessity be appurtenant to them a right of way over adjacent streets and alleys. The entry of the land carried with it such a right of way. The streets and alleys were not afterward at the disposal of the government, except as subject to such easement.' (Ashby vs. Hall, 119 U. S. 526.)

"Every person who attempted to settle upon said lands in such chaotic state established his settlement rights with full knowledge and notice of the fact that before the same could be entered as a townsite or any title acquired from the government, that such lands must of necessity be platted and laid off into blocks, lots, streets and alleys, and took whatever of interest he acquired, subject to this right, and whatever would result from it. Prior to such platting

and sub-division no person could acquire any interest in any definitely described or particularly bounded portion of said tract. There was no way by which it could be determined what the quantity of land would be that would fall to the portion of any settler or occupant. The title acquired by a townsite settler by occupancy or improvement is in and to a lot or lots—such lot or lots must be determined by a plat, survey and sub-division adopted in some manner and generally acquiesced in.

"Recognizing this uncertain, chaotic and disorderly condition of affairs, the experience and intelligence of the American people asserted itself, and they made a rule and law for themselves, and organized committees by and with the consent of the settlers, and empowered them to make surveys and plats and to bring order out of confusion. The people generally acquiesced in this action, and adopted the result of their work and conformed their settlements to the lines of the blocks, lots, streets and alleys as designated by such committees and the provisional government organized by the people for their own guidance and government.

"This step was necessary in order that the settlers might acquire some definite location and become occupants of some definite portion of said tract, otherwise, a townsite never could have been entered or title acquired, as every portion of the tract was occupied and claimed by some person. When these surveys and plats were made, those who were so unfortunate as to have made their location in such portions of the tract as were required for streets were bound to give way, as they had taken their chances in the great lottery for a lot when they had stuck their stake, and had drawn a blank. All could not be on lots, and this they all knew. Some were on lands that had to be used for streets in laying off a town, and this they all knew, Without streets and lots and blocks, there could be no town, and this they all knew, hence no specific interest could be acquired until there was a particular sub-division to which such right could be attached. The people were several days in bringing order out of confusion, and the provisional government which had been organized with the consent of the goverened, was charged with the duty of providing some means of communication between the various portions of the city."

Now, the general history of the city of Oklahoma City at that early date was the same as the general history of the settlement of the city of Guthrie, and the court should take that general history into consideration in this case the same as the Supreme Court of Oklahoma did in the Beamer case. The same necessity for the bringing of order out of the chaotic condition at that early date, the same necessity for the use of the military authorities of the United States in preserving that order, as this court will take judicial notice, existed at Oklahoma City as it did at Guthrie. The same necessity for a provisional organization by the settlers existed at Oklahoma City as it did at Guthrie. The same necessity for the laying out of streets and alleys existed at Oklahoma City as it did at Guthrie. The same approving by the trustees of the survey and plat which was finally adopted by the settlers was done at Oklahoma City as at Guthrie. It was necessary for the trustees to make and approve a plat before they could convey lands to the occupants. The plat, which is contained in the record (page 38) and which gives Grand avenue, in which the land that McMaster claims lies, is a copy of the plat of the townsite of Oklahoma City as made and approved by these townsite trustees, and which is the basis of the title upon that townsite. That plat shows that lots and blocks of convenient size and that streets and alleys at regular intervals were made. However, the decision of the trustees, under the regulations prescribed by the Secretary of the Interior, would, of course, be final and conclusive as to the location of such streets and alleys. It appears in this case, however, that the location of the streets and blocks is the same now, or the same when this case was tried and upon which the findings were made, and which existed the same as before the entry of the townsite, so that the townsite trustees did not disturb any existing condition. What disturbances were made, what controversies occurred, if the court please, betwean the Kickapoos and the Seminoles in the early history of this now important city of Okla-

homa, is of little consequence to this case, as it does appear that McMaster was not an occupant of this ground when the United States conveyed the land to the trustees for trust purposes, and whether he was dispossessed by Kickapoo or Seminole, he was dispossed by the early adjustment by the people to the streets and alleys which they created in this townsite. The trustees found the land in controversy in a street. They left it in the street, and deeded lots and blocks with reference thereto. The city can certainly not now be divested of this street, which has been such since prior to there being a city—a street created in that sovereign power of American citizenship to adjust itself to existing conditions.

THIRTEENTH AND FOURTEENTH ASSIGNMENTS OF ERROR.

These assignments are, of course, virtually included in the others that are presented in this brief. If our positions are correct, then the Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County, which should have been for the defendant in that court, and erred in overruling our motion for a new trial, which was presented, and the court erred in finally rendering judgment against us, which is included in the sustaining of McMaster's motion to vacate the order granting us a second trial, as is allowed by our statute in an ejectment case. Our arguments upon these specifications are presented in the points of law raised in the brief.

FIFTEENTH ASSIGNMENT OF ERROR.

FIRST—EJECTMENT NOT THE PROPER REMEDY.

We contend that whatever may be the rights of the parties to the possession of the ground in controversy, that under the facts as declared by the court in this case, the court should have dismissed plaintiff's (McMaster) petition, and that he was not entitled to recover a judgment for the

possession of this ground. We contend that ejectment will not lie to recover possession of ground which has been appropriated to a public use.

This being a statutory action for the recovery of real estate, the same principles that obtain in the old common law action of ejectment apply here. The right to the possession of the real estate in controversy is the gravamen of the suit, the ground and essence of the complaint. It being a possessory action, the defendant in error to be entitled to recover, must have the right of possession; and whatever takes away from him this right of possession will deprive him of the right to recover in this action. Now the real estate in controversy, as we have seen, is a part of Grand Avenue, one of the principal streets and public thoroughfares in the City of Oklahoma City, a public or municipal corporation. If the city wrongfully took possession of this tract of ground and is holding it for no authorized public purpose or use, then the action can be maintained, and the defendant in error can recover. But the court found that this real estate had been dedicated to the public for an authorized public purpose, and is kept and used by the public for an authorized public purpose, a street of that city. The City of Oklahoma City is a municipal corporation of Oklahoma Territory and a city of the first class, under the laws of said Territory. (See petition of defendant in error filed in the trial court, pages 2 and 59 of record). The tract of land on which said city is founded was conveyed by Patent from the Government of the United States to "Edgar N. Sweet, Levi C. Coe, and David H. Hammons, Trustees of the Townsite of Oklahoma City, in the second county of Oklahoma Territory, in trust for the several uses and benefits of the occupants of the townsite of Oklahoma City, in in said county and Territory, according to their respective interests." (See Exhibit A, page 29 of record and decision, page 68). This Act of Congress required the Trustees,

under the regulations of the Secretary of the Interior, to survey the land into streets, alleys, squares, lots and blocks, or to adopt such survey as may have theretofore been made. Prior to the date of the Patent of the United States, to the Trustees, two plats, or surveys of the tract of land into lots, blocks, streets and alleys were made by the inhabitants of the townsite. The first one was agreed upon and accepted by only a portion of the occupants of the townsite, and was made April 22, 1889. According to this plan, the plat of ground in controversy was described as lots one and two in Block 24, and was claimed by McMaster, the defendant in error, as townsite occupant. A second plat, or survey was made subsequently, according to which the plat of ground in controversy was thrown into and became a part of Grand Avenue, one of the principal streets of the city. This second plat or survey was adopted and enforced by the townsite occupants prior to the organization of the town as a municipality under the Organic Act of the Territory; and was also adopted and approved by the Board of Townsite Trustees, (see opinion, page 68, and Exhibit F). This second plat or survey was adopted and enforced by the municipality under its organization under the laws of the Territory, and continued to be the plan of the city up to the date of the trial of this cause.

The record conclusively shows that all the plot of ground in controversy here was, by the Board of Townsite Trustees, acting under the instructions of the Secretary of the Interior, as provided by said Act of Corgress of May 14, 1890, set apart for the use and benefit of the public as a street and public thoroughfare of said city. The adoption and approval of the plat by the Trustees, under and in accordance with the said Act, was a dedication to the public by the United States of all the land designated in said plat as streets; and under the doctrine announced by the Supreme Court of the Territory in the case of City of Guthrie vs. Beamer, 3 Okla., 652, such appropriation to a public use,

divested McMaster, the defendant in error, of all his interest therein acquired by settlement of occupancy prior to the entry of the land by the Trustees. It was a complete statutory dedication of all the lands embraced in the streets and alleys designated on the plat, which includes the ground in controversy, to the public use, and vested the fee therein in the municipality, to be held in trust for the use and benefit of the public. City of Guthrie vs. Nix et al, 5 Okla., 556; Bockfinger vs. Foster, 10 Okla. 488.

The law as announced by the Supreme Court of Oklahoma in the cases above cited is applicable to the case at bar. The title to the tracts of land embraced in both the townsites of Guthrie and Oklahoma City were acquired from the United States under the same Acts of Congress, by the same methods, and by the same, or similar rules and regulations of the Secretary of the Interior; and the rules of law as applied to the one is likewise applicable to the other. Applying the law in the cases cited, to the case at bar, it follows with irresistible force and conclusiveness that the defendant in error never had such interest or title to the land in controversy as would entitle him to bring or maintain this action for the recovery thereof.

But if we stop and consider this case on principle, and inquire as to its purpose and object, it cannot be sustained on any rational grounds. The object and purpose of the action is to obtain possession of the land in question, and of such action this court, in the case of Dickerson vs. Colgrove, 100 U. S. 578-82, said, quoting the following language from the case of City of Cincinnati vs. Lesee of White, 6 Peters, 431:

"This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away this right of possession will deprive him of the remedy by ejectment."

The judgment of the trial court, affirmed by the Su-

preme Court of the territory was, "That the plaintiff (defendant in error) do have and recover of and from the defendant (plaintiff in error) the possession of said described real estate". This judgment, if carried into execution, must be followed by the the delivery of possession to the defendant in error, a private citizen; and result in the closing of the street and depriving the public of its use as a public highway. This, we submit, is inconsistent with, and repugnant to the public right, and so contrary to public policy that it cannot, on principle, be upheld.

City of Cincinnati vs. White, 6 Peters, 431-41-42.

That case is cited and followed by the Circuit Court in the case of Central Pacific Railroad Company vs. Benity, 5 Sawyer, 118, case No. 2551, Fed. Cases, Vol. 5, page 363, and concerning which the court said:

"On the other hand it has been held that the owner of the fee could not recover the possession from a city entitled to use land as a public square, because the actual possession could not be delivered to him. Cincinnati vs. White's Lessee, 6 Pet. (31 U. S.) 431; This case does away with the idea that the owner of the fee may recover possession of the land dedicated to a public use, subject to the easement."

In the case of Williams vs Milwaukee Industrial Association, Wis. 48. N. W., 665, plaintiff brought his action of ejectment to recover part of the block on which an exposition building was located. The block in controversy had been marked "public" on the plat which had been made and filed by the owner of the land, but it was claimed that the plat was defective, and that the land, if dedicated to a public use, had been devoted to other objects, and denying the right of plaintiff to maintain ejectment, the court said:

" But here the plaintiff seeks to recover possession of a public square which the city has a right to use consistently with the object for which it was dedicated. The city may

build a market house on it if the exposition building is not one. Now, if the plaintiff should recover possession of the square, what use could he make of it which would not be hostile to the public right therein? The public and the private right which the plaintiff would enforce seem incompatible. But he says, in effect, that the trust has been perverted, and that the square has been devoted to objects not justified or designed by the owner who made the dedication. It is possible that an adjoining lot-owner might enforce the trust, and compel the city to cease misappropriating the square. Upon that point we express no opinion. We would suppose that the attorney general, on behalf of the state, might do so were it not for the statute to which we have referred, which expressly sanctions the use which the city has made of the square. But, in any view, if we are wrong as to the effect of the plat operating as a conveyance of the title of the square, we still cannot perceive how the plaintiff would obtain any fruit or benefit from this action of ejectment. A writ of possession would be unavailing or fruitless, as it seems to us, under the circumstances. Would a court order the sheriff to pull down 46-96 undivided part of the exposition building, which the legislature has authorized to be built, maintained and used for the purpose of annual industrial expositions, and, if so, by what rule of law or principle of justice could such action be vindicated?"

And so we say here that the Supreme Court of Oklahoma has found in this case that this land in controversy was platted into a street and is and has been "thrown into the street in Grand Avenue," and that "said City of Oklahoma City had appropriated said lots to its own purposes as a street, and had appropriated the same prior to the conveyance of said tract by the United States to said Trustees; * * * That said plaintiff was not occupying said tract of ground at the time the United States conveyed the same to the defendants as Trustees, but said portion of said tract was at the time used and treated as a street of said city."

And the Supreme Court, in the Beamer case, *supra*, held:

"That the adoption and approval of such plat (meaning the plat made by the Townsite Trustees), was a dedication by the United States of the lands designated on such plats as streets, and that the interest of Beamer as an occupant was divested by such action, and he has no claims against the city or against the Trustees for a conveyance."

The question whether McMaster acquired a vested interest in the property before it was so dedicated by the plat of the Trustees cannot be determined by ejectment. If he ever owned the land, it was taken from him by the plat of the Trustees, and his only remedy and only relief is to ask compensation for the land taken, which he does not do or seek to do in this case. Certainly, under the law and under the authorities, he cannot be permitted, even if he owned or ever did own, a vested interest in the land, now and for many years a part of the streets of Oklahoma City, to obtain judgment to oust the City therefrom and to block up this street, to destroy the public highway used by the abutting lot owners and the people of the city in general; but he must revert to his action to obtain compensation for his land so taken for public use, if he ever had a vested interest therein, which, of course, can be determined when that action arises.

It is contended that McMaster, the defendant in error, acquired some interest in the tract of land in controversy by settlement and occupancy, and that the interest which he thus acquired was of such vested character that he could not be deprived thereof without just compensation, under the constitutional guarantee that private property shall not be taken for a public use without just compensation. We do not wish to be understood as conceding this point, in the least, because we believe that the doctrine announced in the case of the City of Guthrie vs. Beamer, *supra*, applies here, and under the holding of the court in that case, the defend-

ant in error here did not acquire any vested interest in the tract of land in controversy. But if the defendant in error had acquired some interest or right to this property in the first instance, we still claim that he could not maintain this action, which, in principle, is an action of ejectment against the municipality, the plaintiff in error. Prior to the commencement of this action by McMaster, the Legislature of the Territory had provided a mode of procedure, whereby a private citizen could get just compensation for the taking of his property for a public use by a municipality. In other words, the Legislature of the Territory of Oklahoma had provided a special remedy by condemnation under the power of eminent domain, and this remedy was by statutory provision extended to the property owner as well as to the municipality. Sec. 48 of Article 3 of Chapter 12, being Gen. section 393, Vol. 1, Wilson's Revised and Annotated Statutes of Oklahoma, 1903, gives to the council of cities of the first class power over streets and alleys, and provides that "all damages sustained by the citizens of the city or the owners of property therein shall be ascertained as prescribed in section 399." Section 399, which gives the city power to condemn lands outside the city for certain purposes, provides that "the condemnation of such property outside of the city limits shall be regulated in all respects as provided by law for the condemnation of property for railroad purposes." Article 9 of Chapter 18, entitled "Corporations," provides a complete scheme for the organization, construction, operation and management of railroad corporations, and provides a method, by condemnation proceedings, for acquiring the title to lands for such purposes; and the right to have the compensation assessed for property taken for such purposes by condemnation under such proceedings is extended to the property owner. The Legislature of the Territory having thus provided a mode of procedure whereby the land owner can obtain compensation for property taken for a street or public highway, the land owner is con-

fined to that remedy, to the exclusion of all other remedies; and in view of the provisions of this statute, we claim the defendant in error is confined to that remedy, and can not maintain a suit against the municipality to recover the plot of ground in controversy. Vol. 7 Ency. of Pleading and Practice, page 692, states the rule, as follows:

"The statutory remedy given to land owners for land taken for public use is, in general, exclusive of all other remedies, and not merely cumulative. The act of the condemning party being unauthorized by the statute, is not a tort, and, an appropriate remedy being provided by the statute, a common law action will not lie. This rule applies not only to the fixing of the value of the property taken, but also to the ascertainment of damages to property not taken."

In the case of Little Miami Railroad Company vs. William T. Whitacre, 8 Ohio State, page 591, the court lays down this rule in the syllabus:

"Where the legislature in the constitutional exercise of the right of eminent domain, authorizes an act, the necessary consequence of which is to injure the property of another, and at the same time prescribes the particular mode in which the damages shall be ascertained, and compensated, giving to the injured party the right to resort to the same, the person or corporation acting under such authority and within the scope thereof, is not a wrong-doer, nor liable to an action for tort, but must be proceeded against under the statute remedy."

2nd Lewis on Eminent Domain, Sec. 607, is as follows:

"When Statutory remedy is exclusive. In those states in which the law, as held by the courts, permits the occupation of property before compensation is made, it is competent for the legislature to authorize such occupation of private property, upon providing the owner with an adequate remedy whereby he can obtain just compensation to which he is entitled. In such cases, the statutory remedy is exclusive of all other remedies, and supersedes the common-law actions for interfering with the owner's possession."

The statute of the territory above referred to, and others relative to the subject, afford a complete remedy whereby the land owner can obtain full and just compensation for his property taken for the public use, and this being true, the remedy by action of ejectment, or in the nature of ejectment, for the recovery of possession, is superseded by the Statute and the owner must pursue the course pointed out by it. This is now the well established doctrine of the American courts; and applying this rule to the case at bar, we submit, the defendant in error, even if he were possessed of a vested right in the premises, cannot recover in this action; and that his sole and exclusive remedy is by the special proceedings to obtain damages under condemnation as provided by the statute.

In Kaukanna Water Power Co. vs. Green Bay & Miss Cannal Co. 142 U. S. 254 the court says:

"Where a statute for the condemnation of lands for a public use provides a definite and complete remedy for obtaining compensation, such remedy is exclusive."

SECOND—POWER TO CORRECT SURVEY OF OKLAHOMA TOWNSITE VESTED EXCLUSIVELY IN THE POLITICAL AND NOT THE JUDICIAL DEPARTMENT OF THE GOVERNMENT.

We assert finally that the Judgment of the Supreme Court of Oklahoma is erroneous because it decrees to McMaster, as an alleged occupant of the Oklahoma City townsite, a tract of land which has been surveyed and platted by the officers of the United States into a street of said townsite and city, and if this judgment is permitted to stand, it will operate to change the survey of the public lands of the United States without the sanction of the Interior De-

partment, a power which does not exist in the courts. That this land was public land of the United States under the findings of the Supreme Court of Oklahoma, there can be no question. The court found (page 66): "The evidence in this case shows that the lots in controversy were a part of a tract of land conveyed by the United States to certain trustees for townsite purposes, as shown by the patent in evidence," and the relationship of the trustees to this land also clearly appears by the following finding of the court:

"By this conveyance the land was to be held in trust by said trustees, for the occupying claimants, and such trustees were made agent for such claimants, and such lands were also held in trust *sub modo* for the Government until the rightful claimants could be established, and the manner of disposing of the surplus land ascertained."

and by the further finding of the court (page 68) it appears that these trustees "Edgar N. Sweet, Levi E. Coe and David Hammons, were trustees of the townsite of Oklahoma City, in said county, for the benefit of the actual occupants thereof under the act of Congress approved May 14, 1890."

This court has already clearly held and defined the relationship of the trustees to the government of the United States, as well as to the land entered and the claimants therefor under this act. In the case of McDaid vs. Oklahoma Territory, 150 U. S., 209-220, the court decided:

"By the scheme of this act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the government until the rightful claimants and the undisposed of or surplus lands are ascertained. The act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these government appointees, and, until the trustees conveyed, the title did not pass beyond the control of the executive department in that regard.

"The regulation of the execution of the trust by the

Secretary covered the regulation of the matter of controversies between claimants, and also included, in addition and not by way of limitation, THE REGULATION OF THE SURVEY OF THE LAND INTO BLOCKS, STREETS, ALLEYS AND LOTS, and the assessment for purchase money, costs, compensation and expenses. The supervisory power could no more be denied in respect of the decisions of the trustees upon adverse claims than in respect of the survey and assessment."

Now that the decision of this court certainly makes it plain and clear that the Trustees held the land entered in trust *sub modo* for the government until certain things are done, and that this land is to be surveyed by these officers of the goverment "into blocks, streets, alleys and lots," and that the supervisory power over such survey is vested in the Secretary of the Interior, and not in the courts of Oklahoma Territory, and that the courts have no power to compel the Trustees to correct their plats and make lots where streets and alleys have been by them surveyed and placed, either by their own original survey or by "the approval of such survey as may already have been made by the inhabitants thereof," as the first section of this act of May 14, 1890, expressly empowered the trustees to make, under regulations to be provided by the Secretary of the Interior.

Of course if this decree made by the Oklahoma Supreme Court is affirmed, it must, of necessity, work a direct and important change in the survey of this land into lots, blocks, streets and alleys, because if McMaster is finally awarded and decreed this land, then he will be given a lot where a street was located by the people upon the townsite, as the court's finding show, and where the trustees placed the street by their survey and plat. This correction of the survey we contend the courts have no power to make.

In Knight vs. United States Land Association, 142 U. S., 161, the case was brought in ejectment, as the case here, to recover a block of land in the City of San Francisco, Cal-

ifornia, and the title to the land was the thing in controversy, as here, and that title was attempted to be acquired by the United States Land association by escaping the effect of the final and last survey which was made under the authority of the Government. The court declared the law of the case on this point in those parts of the syllabus which read:

"The power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and the action of that department is unassailable in the courts, except by a direct proceeding. * * *

"The Secretary of the Interior had ample power to set aside the Stratton survey of the San Francisco pueblo lands, (although approved by the surveyor general of California, and confirmed by the Commissioner of the General Land Office, with no appeal taken,) and to order a new survey; and his action in that respect is unassailable in a collateral proceeding."

In the opinion the court says:

"It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding."

The court, in that case, considered and defined the power given to the Secretary of the Interior to supervise the public business relating to the public lands of the United States. The court said:

"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department, of which he is the head. It means that in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving

upon the government by reason of the laws of Congress or under treaty stipulations respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and to preserve the rights of the people of the United States."

This townsite act of May 14, 1890, section 1, provided:

"The Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees INCLUDING THE SURVEY OF THE LAND INTO STREETS, ALLEYS, SQUARES, BLOCKS AND LOTS WHEN NECESSARY, or the approval of such surveys as may already have been made by the inhabitants thereof."

And the grant of power there contained is identical in kind, quality and quantity with the power granted to the Secretary of the Interior under Sections 441 and 443 and 2478 of the Revised Statutes of the United States, which were construed and applied in the case of Knight vs. U. S. Land Association, and no distinction can be made in the application of this power between the cases, involving the original survey of the public lands into sections or quarters, or others involving the survey of such lands into streets, alleys, squares, blocks and lots for townsite purposes. The power is the same in either case, and can no more be superceded by action or decree of the courts in one case than in the other.

McMaster, if wronged by the action of the trustees, had ample redress by appeal to the Commissioner of the General Land Office, and then to the Secretary of the Interior, in the action of the trustees in making a survey which placed his alleged claim or lot in a street of the Oklahoma City townsite, and failing to do this, he is, by the Knight case and the McDaid case above referred to, precluded from redress in the courts.

This principle is also referred to in the dissenting opinion of Mr. Justice Pancoast in this case, in which he says (page 71):

"A settler claiming property under the United States townsite laws, before he can maintain an action in the Territorial courts to litigate his claim, must make application to the townsite trustees for a deed and if the trustees refuse to convey to him he must appeal and litigate the matters through all the brances of the Interior Department, if he fails to do this he abandons his claim whatsoever it may be."

PROCEDURE IN OKLAHOMA SUPREME COURT.

On the trial of this case in the District Court in Oklahoma County, on July 7, 1900, judgment was rendered for plaintiff McMaster (p. 47-63) and thereupon the defendant, by notice upon the journal of said court demanded a second trial of said cause as provided by statute in ejectment, which said demand is granted, and the order and judgment of the court vacated, set aside, and held for naught and a second trial is by the court ordered, and the cause continued to the next term of court.

On February 11th, 1901, McMaster, plaintiff in that cause, moved the court to vacate and hold for naught that part of the court's decree granting a second trial, because the statute under which the same was made, was void (p. 50-63).

On April 29th, 1901, that motion was sustained, and the appeal was filed in the Supreme Court of Oklahoma in this case on August 5th, 1901.

In the Supreme Court, defendant in error, filed a motion to dismiss the proceedings in error on the ground that more than one year had elapsed between the final judgment of the District Court, and the filing of the appeal in the Supreme Court of Oklahoma, and because the motion for new trial was not filed within three days allowed bythe Oklahoma Statute. (p. 55) This motion, the Supreme Court of Oklahoma overruled. (p. 57) The defendant in error may attempt to represent the questions involved in that motion, here, and since we will probably have no opportun-

ity to answer that brief, we present our suggestions now, on this point. We have two answers to make to such claims.

First: The defendant in error has, so far as we are advised, at least, made no cross-assignments of error. Therefore, this question should not be considered if presented.

Second: This is purely a question of practice and procedure in the Oklahoma Courts under the Oklahoma Civil Procedure Code and the decision of the Supreme Court of Oklahoma should be held final on this question of practice.

The case of Sweeney vs. Lomme, 22 Wallace, 208, was a proceeding on error to the Supreme Court of the Territory of Montana. The syllabus in point, reads:

"In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff, or the party for whose benefit the bond was given depends upon the code of practice of Montana Territory, this court will not reverse the decision of the Supreme Court of that territory on the question; that being a question on the construction of their own code."

We claim, however, if this court should consider that it should review these questions. that the proceeding in error was taken to the Supreme Court of Oklahoma within the time, that is, within the year allowed by the statutes of Oklahoma. When the District Court granted the second trial as our statute provides, it vacated the judgment rendered, and that judgment remained vacated until April 29th, 1901. During that time it is manifest that the City of Oklahoma City could not have taken an appeal to the Supreme Court of Oklahoma, because there was no judgment to appeal from. The District court had vacated the judgment, and thus the City of Oklahoma City had no judgment to complain of, and there was no judgment from which it could appeal until that judgment was re-instated by the action of the court taken on April 29, 1901. The time for taking the appeal

from the judgment, must certainly, therefore, have run from that time, and the appeal was filed in the Supreme Court of Oklahoma within one year from that date. And, for like reasons, we claim the motion for new trial was filed in time, under the statute. The statute provides: (Sec. 4198, Statutes of 1893)

"The application for a new trial must be made at the term the verdict, report or decision is rendered; and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable dilligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."

Now, when the court, on July 7th, 1900, vacated this judgment and granted us another trial and continued the cause for the term, there was, of course, nothing to lodge a motion for a new trial against. We had already been granted a new and other trial, and it would have been useless or worse than useless to make a motion for a thing that the court had already given us.

We very respectfully ask that this court reverse the judgment of the Supreme Court of Oklahoma, and that the Court, upon the facts and the record and under the law, direct a judgment in favor of the city of Oklahoma City, and that the case of Frank McMaster against the city of Oklahoma City to recover a parcel of ground in a street of the city of Oklahoma City be dismissed.

Respectfully,

S. A. McGINNIS, City Attorney,
C. PORTER JOHNSON,
FRANK DALE and
A. G. C. BIERER,
Attorneys for Appellant.

FILE COPY.

Supreme Court of the United States,

OCTOBER TERM, 1904.

NO. 137.

Office Supreme Court U. S.
FILED
NOV 28 1904
JAMES H. McKENNEY,
Clerk.

CITY OF OKLAHOMA CITY, PLAINTIFF IN ERROR,

vs.

FRANK McMASTER.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

MOTIONS TO DISMISS AND AFFIRM, AND BRIEF IN SUPPORT THEREOF.

FRANCIS J. KEARFUL,
CHESTER HOWE,
Counsel for defendant in error.

[19,127.]

[19,127.]

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 137.

CITY OF OKLAHOMA CITY, *Plaintiff in error*,

vs.

FRANK MCMASTER.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

NOTICE OF MOTIONS TO DISMISS AND AFFIRM.

Notice is hereby given that the annexed motions to dismiss the writ of error and affirm the judgment appealed from will be submitted to the Supreme Court of the United States, at the Capitol, in the City of Washington, on November 28, 1904, at the coming in of the court on that day, or as soon thereafter as counsel can be heard, upon the record in the above entitled cause and upon printed briefs, a copy of which is served herewith.

New York, N. Y., October 29, 1904.

FRANCIS J. KEARFUL,
CHESTER HOWE,
Counsel for defendant in error.

To A. G. C. BIERER,
Counsel for plaintiff in error.

[19,127.]

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 137.

CITY OF OKLAHOMA CITY, *Plaintiff in error*,

vs.

FRANK McMASTER.

MOTIONS TO DISMISS AND AFFIRM.

STATEMENT OF FACTS AND OBJECTS.

Upon the record in the above entitled cause, Frank McMaster, defendant in error above named, moves the court to dismiss the writ of error of the plaintiff in error on the ground that the cause is one not legally cognizable by writ of error, and also to affirm the judgment appealed from on the ground that it is manifest the writ of error and appeal were taken for delay only.

The defendant in error obtained a judgment in the District Court of Oklahoma County, Oklahoma Territory, against the plaintiff in error, Oklahoma City, for recovery of the possession of certain described real estate, together with damages for the wrongful detention thereof (*record*, 48). This judgment was affirmed on appeal by the Supreme Court of the Territory (*record*, 57). For the purpose of bringing the judgment of the Supreme Court to this court for review, the city sued out a writ of error and also obtained the allowance of an

appeal (*record*, 15, 16). There being but one cause, it cannot be here both by writ of error and by appeal. Either one proceeding or the other will have to be dismissed. *Hurst* v. *Hollingsworth*, 94 U. S. 111; 100 U. S. 100, 102; *Plymouth Mining Co.* v. *Amador Canal Co.*, 118 U. S. 264, 269; *Files* v. *Brown*, 124 Fed. Rep. 133, 136; *Lockman* v. *Long*, 132 Fed. Rep. 1.

BRIEF OF ARGUMENT.

I.

THE WRIT OF ERROR SHOULD BE DISMISSED.

The act of Congress of April 7, 1874, c. 80, § 2 (18 Stat. 27, 28), prescribes that the appellate jurisdiction of this court over "judgments and decrees" of the territorial courts "in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal." This statute makes the form of appellate proceeding depend on the single fact of whether there has been a trial by jury, not whether the case might properly have been tried by a jury. In the present case the parties waived a jury and proceeded to trial before the court (*record*, 25, 48). It follows that the writ of error was improper and should be dismissed and the case considered as depending upon the appeal alone. *Stringfellow* v. *Cain*, 99 U. S. 610, 612; *Hecht* v. *Boughton*, 105 U. S. 235, 236; *Story* v. *Black*, 119 U. S. 235, 236–237; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509, 514, 515.

II.

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

The jurisdiction of this court on the appeal depends upon the provisions of the act of Congress, *supra*, which contains the following (18 Stat. 28):

> "*Provided*, that on appeal, instead of the evidence at large, a statement of the facts in the case

> in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings, and judgment or decree."

The effect of this provision is to confine the court *in* its consideration of a case arising upon an appeal from a territorial court to the statement of facts and rulings certified by the court below. As Mr. Chief Justice Waite said, speaking for the court in *Hecht* v. *Boughton*, 105 U. S. 235, 236:

> "We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and *upon an appeal to the statement of facts and rulings certified by the court below.* The facts set forth in the statement which must come up with the appeal are conclusive on us."

This statement of the effect of the statute has been quoted with approval and followed in subsequent cases. *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509, 513–514; *Marshall* v. *Burtis*, 172 U. S. 630, 635.

As the court is confined in its consideration of the appeal to "the statement of facts and rulings" "which must come up with the appeal," it is clear that, in the absence of such a statement, there is nothing for the court to consider. *Gray* v. *Howe*, 108 U. S. 12, 13; *Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S. 109, 117; *Zeckendorf* v. *Zeckendorf*, 171 U. S. 686; *Cohn* v.

Daley, 174 U. S. 539, 544–545; *United States* v. *Hooe*, 1 Cranch, 318, 319–320.

The appeal is from the judgment of the territorial Supreme Court, and the statement of facts and rulings upon which alone this court is authorized to act should have been procured from that court. The only excuse for not procuring it would be the existence in the record of a sufficient statement of facts and rulings by the District Court, which the Supreme Court by the affirmance would be deemed to have adopted.

As Mr. Chief Justice Waite said, speaking for the court, in *Davis* v. *Fredericks*, 104 U. S., 618, 619:

> "As such appeals lie to this court only from the Supreme Court of a territory (Rev. Stat., sect. 702), it follows that *the statement, both as to facts and rulings, on which we are to act*, must be made directly or indirectly by that court."

And in *Cannon* v. *Pratt*, 99 U. S. 619, 621–622:

> "When the Supreme Court affirms the judgment of the District Court upon findings of fact made by the District Court, the Supreme Court in effect adopts such findings as it own for the purposes of appeal to this court."

No such statement "both as to facts and rulings" was made directly by the Supreme Court. True, certain facts and rulings upon which it proceeded to a decision are set forth in the opinion delivered by Irwin, J. (*record*, 57–71). But it is settled that this is not a compliance with the statute. Error cannot be predicated upon statements contained in an opinion. It cannot be resorted to for such a purpose. *Thompson*

v. *Ferry*, 180 U. S. 484, 485; *Stone* v. *United States*, 164 U. S. 380, 383; *Saltoustal* v. *Birtwell*, 150 U. S. 417, 419; *Dickinson* v. *Planters' Bank*, 16 Wallace, 250, 257; *Insurance Co.* v. *Tweed*, 7 Wallace, 44, 51.

The statement of facts and rulings made by the District Court, which the Supreme Court will be deemed to have adopted as its own, are contained in the "Journal Entry of Judgment," signed by the district judge and agreed to as "satisfactory" by the counsel for defendant (*record*, 47–48), wherein it is stated that—

> "the court found, ordered, adjudged and decreed: That the plaintiff is the legal and equitable owner and entitled to the possession of the following described real estate and premises situated in Oklahoma County, Territory of Oklahoma [description by metes and bounds]; that the defendant since November 14th, 1892, has unlawfully kept the plaintiff out of possession and now unlawfully keeps the plaintiff out of possession of said described property; that the value of the use of said property since November 14, 1892, is $250.00 per year; that the plaintiff do have and recover of and from the defendant the possession of said described real estate, together with damages for the wrongful detention thereof in the sum of $250.00 per year for the period of three years next prior to the date of the commencement of this action up to the date of the execution of this judgment, and that the plaintiff have judgment against the defendant for the costs of this action taxed at ———, to which order and judgment of the court, and to each and every part thereof the defendant then and there excepted and excepts."

Manifestly, this statement of itself contains no suggestion of error. The findings and rulings set forth properly support the judgment, and, according to the result of the foregoing decisions, it will be presumed that such findings and rulings are correct.

As it is apparent that if the case is kept here longer it will be for delay only, the motion to affirm should be granted. *Zeckendorf* v. *Johnson*, 123 U. S. 617, 618.

FRANCIS J. KEARFUL,
CHESTER HOWE,
Counsel for defendant in error.

STATE OF NEW YORK, }
New York County, } ss.:

FRANCIS J. KEARFUL, being duly sworn, says: On October 29, 1904, at New York, N. Y., I deposited in the mail a letter containing three copies of the foregoing notice and brief, addressed to Hon. A. G. C. Bierer, Guthrie, Oklahoma, he being the counsel of record for the plaintiff in error, Oklahoma City, and that being his proper address. Said letter was duly postpaid, and the time when it was so mailed was at such time as to reach said counsel, by due course of mail, more than three weeks before November 28, 1904, the time fixed by the notice for the presentation of the motions therein referred to.

Subscribed and sworn to }
before me this day }
of November, 1904. }

FILE COPY.

FILED
JAN 14 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1904.

NO. 137.

CITY OF OHLAHOMA CITY,
Plaintiff in Error and Appellant,

vs.

FRANK McMASTER.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA

BRIEF FOR McMASTER.

FRANCIS J. KEARFUL,
Of counsel for McMaster.

[19,127.]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

No. 137.

CITY OF OKLAHOMA CITY,
Plaintiff in error and appellant,

versus

FRANK MCMASTER.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF FOR MCMASTER.

By a writ of error and also by an appeal (*record*, 1–18) the city of Oklahoma City brings to this court for review a judgment of the Supreme Court of the Territory of Oklahoma (*record*, 57) affirming a judgment of the District Court of Oklahoma county against it in favor of McMaster for recovery of the possession as owner of two certain lots in Oklahoma City, together with damages for the wrongful detention thereof (*record*, 58, 63).

I.

THE RECORD PRESENTS NOTHING FOR THIS COURT TO REVIEW.

1. *The motions to dismiss and affirm.*

On November 28, 1904, we presented to this court on behalf of McMaster motions to dismiss and affirm (consideration of which was postponed to the hearing on the merits) showing that the writ of error should be

dismissed, because the case was tried without a jury (*record*, 62), and that the judgment appealed from should be affirmed, because the record contained no "statement of facts and rulings certified by the court below," as required by the act of Congress of April 7, 1874, c. 80, § 2 (18 Stat. 27–28) and the decisions of this court in cases coming by appeal from the territorial courts (*Motions and Brief*, 4–7; *Stringfellow* v. *Cain*, 99 U. S. 610, 612; *Cannon* v. *Pratt*, 99 U. S. 619, 621–622; *Davis* v. *Fredericks*, 104 U. S. 618, 619; *Hecht* v. *Boughton*, 105 U. S. 235, 236; *Gray* v. *Howe*, 108 U. S. 12, 13; *Story* v. *Block*, 119 U. S. 235, 236–237; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509, 513–514; *Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S. 109, 117; *Marshall* v. *Burtis*, 172 U. S. 630, 635; *Cohn* v. *Daley*, 174 U. S. 539, 544–545; *Thompson* v. *Ferry*, 180 U. S. 484, 485; *United States* v. *Hooe*, 1 Cranch, 318, 319–320).[1] Counsel for the City, in answer to the motions, abandon the writ of error and rely upon the appeal alone (*Answer to Motions and Brief*, 26-27), basing their claim to a compliance with the statute in cases of appeal solely upon the opinion of the territorial Supreme Court. They say (*ib.* 27):

> "The statement of facts is contained in what the court calls a 'statement of the case,' in the opinion of the court, written by Irwin, J."

And again (*ib.* 38):

> "Now we are not asking, in the case at bar, any review in matter of fact, but are only asking

[1] If the decision in *Comstock* v. *Eagleton*, on January 3, 1905, applies to this case, the appeal should be dismissed because the action is an action at law, and the writ of error should be dismissed for the lack of a bill of exceptions. See brief, *infra*, p, 18.

> this court to pass upon the questions of law which we present upon the facts as presented by the decision of the Supreme Court of the Territory of Oklahoma, and *we are asking this court to consider the facts as they are stated in the opinion of that court, and to correct the application of the law thereto.*"

It is therefore quite clear that unless the opinion of the court below can be held to be a compliance with the statute, the record presents nothing for review and the judgment will have to be affirmed.

Is the opinion a compliance with the statute? The provision is (18 Stat. 28):

> "*Provided*, that on appeal, instead of the evidence at large, a statement of the facts in the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

There is no statute of the United States or of Oklahoma or any rule of court requiring the opinion of the territorial Supreme Court to contain "a statement of the facts of the case in the nature of a special verdict" or a statement of "the rulings of the court on the admission or rejection of evidence when excepted to," or that the opinion shall be "made and certified by the court below and transmitted to the Supreme Court" as such statement of facts and rulings. The opinion and dissenting opinion in this case were prepared by Judge Irwin and Judge Pancoast of the court below and filed with the papers in the case in compliance

with section 4456 of the Oklahoma Statutes of 1893, which reads (p. 859):

> "It shall be the duty of the judges of the supreme court to prepare, and file with the papers in each case, full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party; and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed."

And the opinions were transmitted to this court by the clerk of the court below in compliance with section 2 of Rule 8, which reads:

> "In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case."

Although these opinions are thus properly before the court for its information as to the questions presented to and decided by the court below (*San Jose Land Co.* v. *San Jose Ranch*, 189 U. S. 177, and cases cited; *Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S. 109, 116), it is quite evident that in no case can an opinion of the court below, merely as such and of itself alone, form the basis of any assignment of error. A successful party has no voice in the preparation of an opinion. He is not consulted or permitted to be heard as to its contents, and his rights cannot be held to rest upon any such basis. He has a judgment and

the statute points the way to his adversary if he would seek a review in this court.

"A statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below." But the court below is under no duty to make and certify any such statement unless application therefor be made to it by the defeated party in contemplation of an appeal. It cannot know when it prepares its opinion that an appeal will be taken. In the orderly course of obtaining such a statement as that contemplated by the statute, it would be applied for by the defeated party after due notice of his intention to appeal, and both parties would thereupon be accorded an opportunity to be heard as to its contents. Then, if either party should fail to have inserted in the statement of facts and rulings all to which his rights entitle him, the responsibility would be his. Any other course would cast upon the successful party the burden of obtaining a statement of facts and rulings sufficient to support the judgment on an appeal by his adversary, contrary to the most familiar elementary principles. Therefore, it is not strange that counsel for the City are unable to cite a single instance of an acceptance by this court of the opinion of the court below as a substitute for the statement required by the statute. But instances to the contrary are numerous in cases arising under this very statute and the analogous provisions relating to appeals from the Court of Claims and the Circuit Courts of the United States. In

Thompson v. *Ferry*, 180 U. S. 484, an appeal from the Supreme Court of Arizona was affirmed for the lack of a proper statement, and the Chief Justice said:

> "The opinion of the trial court sets forth facts on which it proceeds, but there are no specific findings as such."

The record of that case also shows (pp. 117, 120) that the opinion of the territorial Supreme Court "by Street, C. J." contained a "Statement" preceding the "Opinion" in which are set forth the facts and rulings upon which its conclusions are based. So in the case at bar, there is an "Opinion by Irwin, J." (*record*, 57), containing a "Statement of the Case" (*record*, 58), and a "Dissenting opinion by Pancoast, J." (*record*, 71).

In *Gray* v. *Howe*, 108 U. S. 12, where the judgment of the Supreme Court of the territory of Utah was affirmed for the lack of this required statement, the record (p. 16) contained "the opinion of said court in said cause" which stated the facts and conclusions upon which the judgment was rendered.

In *Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S. 109, 116, the court read the decree of the Supreme Court of Utah in the light of its opinion for the purpose of determining its finality for the purpose of appeal, but as it appeared (p. 118) that there was no requisite statement of facts and rulings the decree was affirmed. The record (pp. 57–60) contains an opinion of all the judges which refers to the testimony, exhibits and pleadings, also contained in the record.

In *Stone* v. *United States*, 164 U. S. 380, 383, affirm-

ing a judgment appealed from the Court of Claims, the court, by Mr. Justice Brewer, said:

> "We are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings."

In *Lehnen* v. *Dickson*, 148 U. S. 71, counsel sought to cure the lack of sufficient findings of facts by reference to the opinion of the judge of the Circuit Court, but this court, by Mr. Justice Brewer, said (p. 77):

> "They suggest that in the opinion delivered by the trial judge there is a narration of the facts we have heretofore recited, together with others, and then this statement preliminary to the discussion of the legal question: 'Thayer, District Judge, after stating the facts above,' and claim that such statement is equivalent to a finding of the facts as previously recited. . . . With reference to the language of Judge Thayer, it is obvious that no such significance as is claimed can be given to the words 'after stating the facts as above.' Reading the prior statement, it would seem to be only a succinct recital of the material testimony in the case. *Noris* v. *Jackson*, 9 Wall. 125."

In *Dickinson* v. *The Planters' Bank*, 16 Wall. 250, 257, an appeal from a Circuit Court, the court, affirming the judgment, by Strong, J., said:

> "Here the record as returned contains what is stated to be what is all the evidence in the cause, but the court has not found what the evidence proves, nor any ultimate facts except that stated in the judgment, 'that the defendant did not assume and promise as the plaintiff in declaring has alleged.' Some facts indeed are stated in the opinion of the court, that seem to have accompanied the judgment, but they

> are not stated as a special finding. They are rather advanced as reasons why the judge came to the conclusion that the alleged promise of the defendants had not been proved. It is impossible to regard anything that appears in this case as equivalent to a special verdict."

In *Insurance Co.* v. *Tweed*, 7 Wall. 44, 51, the Court, by Mr. Justice Miller, said:

> "We are asked in the present case to accept the opinion of the court below as a sufficient finding of the facts within the statute, and within the general rule on this subject. But, with no aid outside the record, we cannot do this. The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection often referred to in this court, that it states the evidence and not the facts as found from that evidence."

But even if the opinion of the court below may in a proper case be regarded as a compliance with the statute, this is not such a case. For the purpose of enabling the counsel for the City to present their assignments of error, they show that the court in giving the reasons for its judgment, among other things, referred to "the substantial part" of one of the exhibits "contained in the 'case-made,'" and (*Answer to Motions, 29–30*)—

> "thus we claim carried the same into the opinion of the court, by its reference, with the same force and effect as if they had specifically set it out therein."

There could be no stronger proof than this of the insufficiency of the opinion as a statement of facts and rulings under the statute. If incorporation of such exhibit by reference were permitted we perceive no

reason why the entire record should not be incorporated in the same way. The court also refers to the judgment of November 14, 1892, introduced by McMaster as the basis of his claim (*record*, 62), and this cannot be incorporated because it is not found in the record, although its consideration would be of vital and controlling importance to McMaster.

That such incorporation by reference in a statement under the statute cannot be permitted, is abundantly shown by *Thompson* v. *Ferry*, 180 U. S. 484–485, and *Cohn* v. *Daley*, 174 U. S. 539, 542–543.

2. *The alternative motion for an order on the territorial Supreme Court.*

Apparently, in realization of the weakness of their position, counsel for the City supplement their answering brief with a counter alternative motion for an "order upon the Supreme Court of Oklahoma to make, certify and transmit to this court a statement of facts of the above cause in the nature of a special verdict," etc. (*Answer to Motions and Brief*, 42). As to such alternative motion it should be sufficient to observe that nowhere appears any demand upon or refusal by the territorial Supreme Court to make or certify or transmit a statement of facts or rulings,—obviously an essential prerequisite to the granting of the motion. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, 32; *Hudson* v. *Parker*, 156 U. S. 277, 288.

Moreover, an inspection of the record certified from the territorial Supreme Court shows, not only that a refusal by it to make the required statement of facts and rulings would be justified, but that it would be im-

possible for it to make such a statement upon the record before it. That record consists of a "case-made" certified from the trial court (*record*, 21–54), which shows that the plaintiff McMaster introduced in evidence "a judgment rendered in the case of McMaster *vs.* The Townsite Trustees by Justice John H. Burford on the 14th day of November, 1892." It was admitted and "marked exhibit 'B.'" He also introduced "a certificate of the register of deeds upon that judgment, showing that it has been recorded in his office in Oklahoma County wherein the land is situated," which was also admitted and "marked under the same order" (*record*, 25). A further order "by Judge Burford, in the same case, dated October 13th, 1893" (*record*, 25, 38), refers to the judgment of "the 14th day of November, 1892," as adjudging the right of McMaster to a deed of the lots in question, in accordance with which the townsite trustees are ordered to execute and deliver to him such deed.

The judgment of November 14, 1892, adjudging the right of McMaster to these lots, together with the certificate of the register of deeds showing it to have been "recorded in his office in Oklahoma county wherein the land is situated" had all the force and effect of a deed by virtue of the Oklahoma statutes of 1897, page 98, which provides (§ 32):

> "Any judgment or decree of a court of competent jurisdiction finding and adjudging the rights of any party to real estate or any interest therein, duly certified, may be filed for record, and recorded in the office of the register of deeds, with like effect as a deed duly executed and acknowledged."

It thus appears that these two documents were the very basis of McMaster's claim of ownership and right of possession to the lots in question. But although this is so, neither of them anywhere appear in the record. The document marked "exhibit B" (*record*, 36) nowhere appears to have been introduced in evidence. It appears to be a statement of facts and conclusions made by the same judge in the same cause in which the judgment of November 14, 1892, was rendered, but it was made on or prior to May 11, 1892, as appears from the certificate of the clerk (*record*, 37), but it certainly is not the judgment of November 14, 1892. We may surmise that this statement was a part of the judgment roll, and that the remainder, including the judgment of November 14, 1892, was omitted from the case made through inadvertence or otherwise, but, of this there is no proof, and neither this court nor the territorial Supreme Court can act upon surmises. It does not appear that the judgment of November 14, 1892, and the certificate of its recording, were before the territorial Supreme Court, but the fact that it was admitted in evidence and was before the trial court, and the further fact that it is not identical with exhibit B shown in the record appears from the following extract from the statement of facts in the opinion (*record*, 62):

> "The plaintiff introduced in evidence patent from the United States Government to the town site trustees. Objected to. Overruled. Exception. Plaintiff then introduced judgment rendered in the case of McMaster *vs.* The Townsite Trustees, by Justice John H. Burford on the 14th day

> of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office, in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception."

In this condition of the record, it would be impossible for the Supreme Court to make a proper statement of facts and rulings, for such a statement, in the absence of findings by the trial court, would require a consideration of the evidence. In *School District* v. *Trotter*, 10 Oklahoma, 625, 626–627, the Supreme Court of Oklahoma, by Hainer, J., said:

> "The basis of this action was the contract, which the plaintiff alleges was entered into between herself and the school district, the plaintiff in error. It appears from the case made that this contract was introduced in evidence, but has been, through inadvertence or otherwise, left out of the record. This court has repeatedly held that where the questions presented to this court for review by the plaintiff in error depend upon the consideration of the evidence introduced upon the trial in the court below, the case-made must contain all the evidence, and this must affirmatively appear in the case-made itself. A mere statement in the certificate of the district judge that it contains all the evidence is not sufficient."

To the same effect is *Pierce* v. *Engleheimer*, 10 Oklahoma, 308, 315, and cases cited.

In this situation it cannot be supposed that the territorial Supreme Court would undertake to "make, certify and transmit" the statement of facts and rulings required by the statute and contemplated by the alter-

native motion made on behalf of the City. An application therefor would be refused, and the refusal would be abundantly justified (*Armijo* v. *Armijo*, 181 U. S. 558, 561).

II.

THE MERITS PRESENTED BY THE OPINION.

Assuming, however, that the court may accept the "statement of the case" contained in the opinion of Judge Irwin as a compliance with the statute, we pass to a consideration of the merits of the case thus presented. The statement is as follows (*record*, 58):

> "*Statement of the Case.*
>
> This is an action brought by the defendant in error, Frank McMaster, against the plaintiff in error, The City of Oklahoma City, in the district court of Oklahoma county, on the 22nd day of September, 1899, for the recovery of the possession of two certain lots, to wit, lots numbers one and two of block number twenty-four of the original plat of said city, as filed in the United States Land Office, to recover the possession of said lots, and damages for the wrongful detention thereof."

Then follow the pleadings, consisting of the plaintiff's petition alleging in substance that he is the legal and equitable owner and entitled to the possession of the lots in controversy, and that the defendant, a municipal corporation, unlawfully keeps him out of the possession thereof, and praying judgment for its recovery and damages for withholding the possession (*record*, 59); the defendant's general demurrer to the petition which "was

by the court overruled, to which the defendant excepted" (*record*, 60); the defendant's answer, containing the defense in substance that the tract claimed by the plaintiff as lots are a part of a lawful "public highway and street of said city," and that the plaintiff has not and never had any interest therein (*record*, 60–61); the plaintiff's replication denying the allegations of the answer that contradict the petition (*record*, 62); after which the statement continues and concludes (*record*, 62–63):

> "And on the 15th day of February, 1900, at a regular term of the district court of the third judicial district held in and for Oklahoma county, in the territory of Oklahoma, the said cause came on for trial before the Hon. B. F. Burwell, presiding judge, jury having been waived, and the plaintiff introduced in evidence patent from the United States Government to the town site trustees. Objected to. Overruled. Exception. Plaintiff then introduces judgment rendered in the case of McMaster *vs.* The Townsite Trustees, by Justice John H. Burford, on the 14th day of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office, in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception.
>
> Plaintiff then offers in evidence a further order of the district judge, Burford, in the same case, dated October 13th, 1893, with a certificate of the register of deeds of Oklahoma county, showing that the same had been recorded in his office. Objected to. Overruled. Exception. Witnesses were then sworn and testify as to the rental values. Here the plaintiff rests. Defendant demurs to the evidence. Whereupon, attorney for the plaintiff, by leave of the court, introduces as further evidence in the case, the journal and the

order made by the court in case No. 278, of the district court of Oklahoma county, entitled Frank McMasters *vs.* Edgar N. Sweet, Levi E. Coe and David H. Hammons, townsite trustees. Said order and journal granting a change of venue, in said cause. And thereafter the said defendant refiles its demurrer to the evidence of the plaintiff; which demurrer is overruled, and exception. The defendant introduces testimony to show the final receipt of the local land office to the townsite trustees. No objection, same is admitted and read in evidence. The defendant then offers in evidence a plat of the city, approved by the board of townsite trustees No. 2. Objection overruled. Exception.

The defendant proves by the register of deeds that the plat is one of the plats of record in the office of the register of deeds of this county. The defendant offers in evidence entries of the county commissioners' proceedings, in Book One, page 11–12 and 13. Objection. Overruled. Exception.

Here the defendant rests. Whereupon the court rendered judgment in favor of the plaintiff for the recovery of the possession of said real estate together with damages for the wrongful detention thereof, in the sum of two hundred and fifty dollars per year, for the three years prior to the commencement of this action up to the execution of this judgment, and against the defendant for costs. To which order and judgment of the court the defendant then and there excepted.

Whereupon the defendant, by notice on the journal of said court, demanded a second trial, which demand is granted, and said judgment is set aside and vacated, and said cause is continued until the next term of this court.

Thereafter, on the 21st day of January, 1901, plaintiff filed a motion to set aside the order granting a new trial as a matter of right, on the ground that said notice, and the proceedings thereunder are

wholly void, without right or authority, and asking that the court reinstate the judgment in said cause, on the 7th day of July, 1900, in favor of the plaintiff, which motion the court sustains, to which the defendant then and there excepts. On the same day the defendant files its motion asking the court for a new trial in said cause, on statutory grounds; plaintiff moves that said motion for a new trial be stricken from the files, for the reason that the same is not filed within the three days' time required by law, after the rendition of judgment, in said cause, which said motion was, upon the consideration of the court, overruled, to which the plaintiff excepts. Whereupon said motion for a new trial in said cause was duly submitted and argued by counsel for plaintiff and defendant, and overruled, to which ruling the defendant excepts, and brings the cause here for review."

The action was authorized by Section 614, Oklahoma Civil Code (Stat. 1893, p. 864), which reads:

> "In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal or equitable interest therein, and is entitled to the possession thereof, describing the same, as required by section one hundred and twenty-seven, and that the defendant unlawfully keeps him out of possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived."

Section 127 here referred to reads (*ib.* p. 782):

> "In any action for the recovery of real property, it shall be designated with such convenient certainty as will enable an officer holding an execution to identify it."

The answer, by denying the plaintiff's title, admitted its possession. Section 615 provides (*ib.* p. 865):

> "It shall be sufficient in such action, if the defendant in his answer, deny, generally, the title

> alleged in the petition, or that he withholds the possession, as the case may be, but if he denies the title of the plaintiff, possession by the defendant shall be taken as admitted."

Issue as to the defendant's claim that the tract in question was a part of a lawful street and public highway was joined by the replication, to which no objection was made, and the parties proceeded to trial before the court after waiving a jury. The result of the trial was a general judgment for McMaster for the recovery of the lots in question and damages for the wrongful detention thereof (*record*, 63).

No objection is made to that part of the judgment awarding damages for the wrongful detention.

The trial judge made no finding of facts other than the general one contained in the journal entry of its judgment that "the plaintiff is the legal and equitable owner and entitled to the possession" of the tract in question (describing it); that "the defendant, since November 14, 1892, has unlawfully kept the plaintiff out of possession and now unlawfully keeps the plaintiff out of possession of said described property; that the value of the use of said property since November 14, 1892, is $250 per year; and that the plaintiff do have and recover of and from the defendant the possession of said described real estate, together with damages," etc. (*record*, 48).

The District Court of Oklahoma county is one of general original jurisdiction (Organic Act, § 9, 26 Stat. at L. 85), and a general judgment by a court of this character, in the absence of special findings, implies a finding of all facts necessary to support the judgment. As this

court had occasion to say at the present term, speaking through Mr. Justice Brewer in *Fayerweather* v. *Ritch*, 195 U. S. 276, 307:

> "Of course, the omission of special findings means nothing, for the judgment implies a finding of all necessary facts."

The Supreme Court, by affirming this judgment (*record*, 57) without findings "in the nature of a special verdict," will be deemed to have adopted the general finding of the District Court. *Cannon* v. *Pratt*, 99 U. S. 619, 621–622.

We might rest the consideration of this case here, but the points made by counsel for the City based upon alleged erroneous rulings of the trial court present little difficulty and may be noticed.

III.

CONSIDERATION OF THE POINTS MADE BY THE PLAINTIFF IN ERROR AND APPELLANT.

1. *The absence of a bill of exceptions.*

A fundamental objection to the entire argument of the counsel for the City on the merits is that the record contains no bill of exceptions showing the alleged erroneous rulings on the trial, and the grounds of objection thereto as required by the Oklahoma statutes. Sections 311 to 315 of the Oklahoma Civil Code (Stat. 1893, pp. 813-814) provide:

> "§311. An exception is an objection taken to a decision of the court or judge upon a matter of law.
>
> §312. The party objecting to the decision must except at the time the decision is made, and time

may be given to reduce the exception to writing, but not beyond the term. If the decision objected to is made in vacation or at chambers, the judge may give time to reduce the exception to writing, not exceeding ten days.

§313. No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible.

§ 314. Where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts.

§ 315. Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing, and present it to the judge for his allowance. If true, it shall be the duty of the judge to allow and sign it; whereupon it shall be filed with the pleadings as a part of the record, but not spread at large on the journal. If the writing is not true, the judge shall correct it, or suggest the correction to be made, and it shall then be signed as aforesaid."

We have seen that the "case-made" as it appears in the record is so defective as to exclude it from consideration (*supra*, pp. 10–12). Outside of it there was nothing to show what occurred in the trial court. It was "Exhibit A" to the "Petition in Error" by which the case was taken to the territorial Supreme Court (*record*, 19, 21), and upon these two papers the judgment was affirmed. There was no transcript of the record brought from the trial court, which would show the bill of exceptions, if any, and the so-called case-made cannot be permitted to serve as a bill of exceptions or proper transcript of the

record. *Schumacker* v. *O'Brien*, 19 Kansas, 476, 477; *Herren* v. *Merrilees*, 7 Oklahoma, 261, 266. This is fatal to every claim of error, as this court has decided at the present term. *Metropolitan R. Co.* v. *District of Columbia*, 195 U. S. 322, 329. See also *Armijo* v. *Armijo*, 181 U. S. 558; *Cohn* v. *Daley*, 174 U. S. 539, 544; *Hecht* v. *Boughton*, 105 U. S. 235, 236; *Comstock* v. *Eagleton*, opinion Jan. 3, 1905.

2. *The order reinstating the judgment.*

The principal claim of error is based upon the ruling of the trial court in setting aside the order granting a second trial after judgment and reinstating the judgment on motion of the plaintiff (*record*, 63). This claim of error was not presented to the territorial Supreme Court, and was therefore by that court rightly deemed to have been abandoned. This ruling is in accordance with established principles, as shown by the numerous cases cited in the opinion (*record*, 64-66), in one of which Mr. Justice Brewer, then a justice of the Supreme Court of Kansas, delivered the opinion. *Campbell* v. *Phillips*, 28 Kansas, 753, 754. It is also in accordance with the practice of this court. *Duvall* v. *United States*, 154 U. S. 548. And this court will not consider a matter assigned as error which has not been properly presented in the court below and there adjudicated. *Chicago, etc., Ry. Co.* v. *McGuire*, opinion Mr. Justice Brown, Jan. 3, 1905, and cases cited. But even if the objection were still open it is manifestly groundless when we observe that neither the grounds of the ruling nor the grounds of the City's objection thereto anywhere appear in the record. For all that appears,

there was evidence before the trial court showing that the statute allowing such second trial (Okla. Stat. 1893, p. 865, § 618) had not been complied with. Two motions to reinstate the judgment made on behalf of McMaster are shown in the record (49–51), neither of which are referred to in the order reinstating the judgment (*record*, 51). This order makes no finding, and, according to the familiar rule in such cases, a finding of all the facts necessary to support it will be implied. *Fayerweather* v. *Ritch*, 195 U. S. 276, 307.

3. *The judgment in the case of McMaster* vs. *Townsite Trustees.*

As proof of his title in the trial court, McMaster introduced a "judgment rendered in the case of McMaster *vs.* Townsite Trustees, by Justice John H. Burford, on the 14th day of November, 1892," after having introduced "patent from the United States Government to the townsite trustees" (*record*, 62, 25). Counsel for the City claim that this was error. It could not be error unless the judgment were wholly void, and this the counsel claim, but an insuperable difficulty in so holding lies in the fact that the judgment, although before the trial court, is not to be found in the record. Evidently counsel labor under a very great misapprehension, for they seem to consider that a paper found in the record (p. 36) and purporting to be findings by Judge Burford in the case against the townsite trustees was the judgment of November 14, 1892, upon which McMaster founds his claim of title. But this assumption is wholly unwarranted, as we have before shown (*supra*, pp. 10–12). With this fact

in mind, the entire contention of counsel for the City on this head falls to the ground. Even if the supposed findings were made in that case, and it does not appear that they were, there is nothing to show that the Court based its judgment of November 14, 1892, upon them. For all that appears, they may have been withdrawn or further findings made. Indeed, there is absolutely nothing to show that they were ever introduced in evidence in this case.

With an apology for indulging in speculation in the absence of the judgment of November 14, 1892, against the townsite trustees, we suggest it may be assumed that it had been determined by a proper proceeding before the proper tribunal that McMaster was the only person having any claim to the tract in question consisting of the two town lots in controversy; that thereupon it became the duty of the trustees to execute and deliver to McMaster a deed to these lots in execution of the trust assumed by them under the act of May 14, 1890, c. 207 (26 Stat. 109). For all that appears, the townsite trustees themselves had determined in favor of McMaster and had arbitrarily withheld from him the deed to which he was entitled. It is permissible to assume that this is so if necessary to sustain the judgment. *Fayerweather* v. *Ritch*, 195 U. S. 276, 307. Certainly in such a case the District Court of Canadian county on a change of venue from Oklahoma county (*record*, 62–63, 39, 30), had jurisdiction in a suit by McMaster against the trustees to compel them to give him his deed, for it was invested with general

original jurisdiction by the Oklahoma Organic Act, § 9 (26 Stat. 85–86).

These considerations also dispose of the contention that McMaster never acquired any vested interest in the lots in controversy.

4. *Appropriation of McMaster's lots for a public use.*

It is next objected that this action would not lie because the lots claimed by McMaster had been appropriated by the City and used as a public street. There might be something in this objection under the authorities cited by counsel for the City if the action were to recover the title "subject to the easement" (*Appellant's brief*, 60). There is in this case no question of a valid dedication to a public use,—nothing to interfere with the plaintiff's rightful possession but the wrongful acts of the defendant. The issue as to this point was distinctly made by the pleadings and must be held to have been ruled in favor of the plaintiff in the trial court on the testimony.

5. *The proper tribunal for the settlement of conflicting claims to Oklahoma town lots.*

There is in this case no necessity to determine whether claimants to town lots under the act of May 14, 1890 (26 Stat. 109), must prosecute their claims in the land department of the Government or in the territorial courts under the regulations established by the Secretary of the Interior, which provide for appeal to the Commissioner of the General Land Office and also for resort to the courts "for the purpose of settling the title to the lot or lots in controversy." *McDaid* v.

Oklahoma, 150 U. S. 209, 216. It is unnecessary because, in the absence of anything to the contrary, it must be presumed in support of the judgment of November 14, 1892, and of the judgment in this case that the proper procedure was taken and resulted favorably to McMaster.

IV.

CONCLUSION.

The writ of error and appeal should be dismissed, or the judgment appealed from should be affirmed.

Washington, Jan. 14, 1905.

FRANCIS J. KEARFUL,
Of Counsel for McMaster.

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Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 137.

CITY OF OKLAHOMA CITY,
Plaintiff in Error and Appellant,

vs.

FRANK McMASTER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

PETITION FOR REHEARING.

FRANCIS J. KEARFUL,
Counsel for McMaster.

[19,127.]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

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CITY OF OKLAHOMA CITY,
Plaintiff in error and appellant,

versus

FRANK MCMASTER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

PETITION FOR REHEARING.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

FRANK MCMASTER, defendant in error in the above entitled cause, presents this his petition for a rehearing of said cause, and respectfully shows the following reasons therefor:

The decision of this court, rendered February 20, 1905, reversed a judgment of the Supreme Court of the Territory of Oklahoma which affirmed a judgment of the District Court of Oklahoma County in favor of McMaster against the City of Oklahoma City for the recovery of two certain lots in said city and damages for the wrongful detention thereof (record, pp. 48, 63). The opinion, delivered by Mr. Justice Peckham, shows that the decision of the court was based upon a plain

misapprehension of the record in two controlling particulars, viz.:

(I.) The title of McMaster upon which his judgment was based was a former adjudication in another case, and, although the record plainly shows a formal judgment rendered in such other case on November 14, 1892, nevertheless it was stated in the opinion that: "*It is plain that there has been no formal judgment entered in the case.*"

(II.) The cause having been considered as depending alone upon the writ of error, a sufficient bill of exceptions was essential to a review, and, although the record contains no bill of exceptions, but only a "case-made" in such condition that, under the settled Oklahoma practice, no question of error in the introduction of evidence could be considered, nevertheless it was stated in the opinion that: "*The record shows a sufficient bill of exceptions.*"

I.

In proof of his title in the trial court, McMaster "introduced in evidence patent from the United States Government to the townsite trustees" (62, 25). He then introduced a formal judgment in his favor against the townsite trustees, *rendered on the 14th day of November, 1892*, which presumably settled his title to the lots in controversy. This appears from the statement made by the territorial Supreme Court, as follows (62):

> "Plaintiff then introduces *judgment rendered in the case of McMaster* vs. *The Townsite Trustees*,

by Justice John H. Burford, on the 14th day of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception.

"Plaintiff then offers in evidence *a further order* of the district judge, Burford, in the same case, *dated October 13th, 1893,* with a certificate of the register of deeds of Oklahoma county, shoving that the same had been recorded in his ofice. Objected to. Overruled. Exception."

And in the opinion it is said (67):

"No appeal was taken from *the findings and judgment* of the district court of Canadian county."

The "case-made" which was before the territorial Supreme Court contains the following recitals of occurrences at the trial (25):

"Mr. Howard: I now desire to offer in evidence a judgment rendered in the case of McMaster *vs.* The Townsite Trustees by Justice John H. Burford on the 14th day of November, 1892.

To which defendant objects *as incompetent, irrelevant and immaterial, and the City of Oklahoma City not being a party to said cause.*

By the Court: Overruled. Let it be marked as an exhibit in the case. You will be given exceptions to all of these offers.

Marked Exhibit B.

Here the plaintiff also offers in evidence a certificate of the register of deeds upon that judgment, showing that it has been recorded in his office in Oklahoma county wherein the land is situated.

Mr. Douglas: Defendant objects as incompetent, irrelevant and immaterial.

By the Court : I will let that be marked under the same order.

To which the defendant excepts.

Plaintiff now offers in evidence *a further order* of the district—by Judge Burford, in the same case, *dated October 13th, 1893*, together with a certificate of the register of deeds of Oklahoma county, that the same has been recorded in his office.

To which defendant objects as incompetent, irrelevant and immaterial.

By the Court: Let it be marked under the same rule.

To which defendant excepts.

Marked Exhibit C."

The order "dated October 13th, 1893," shows on its face that it was in execution of the judgment of "the 14th day of November, 1892." It contains the following statement (38) :

> " It is ordered herein that said defendants make, execute and deliver to Frank McMaster, plaintiff herein, a trustees' deed *as decreed by this court on the 14th day of November, 1892*, of the following described premises and real estate: "

It thus appears that the judgment rendered on November 14, 1892, and the order made in execution thereof on October 13, 1893, were both made by the same court, presumably in a case properly brought before it in each instance.

The reason for the misapprehension as to the judgment of November 24, 1892, lies in the absence of such judgment from the record. But surely its omission from the record cannot be ground for holding that it does not exist. The bill of exceptions, if any, is that of the plaintiff in error. Can it be that a plaintiff in error may omit from his bill of excep-

tions a judgment upon which his adversary relies, which is shown to have been introduced in evidence, and which is described in a subsequent order in ~~extension~~ of it as decreeing the title and right to a deed in favor of the plaintiff, and upon such a bill of exceptions argue that a formal judgment never was rendered?

Of course, the court did not intend to sanction any such practice, but was deceived by the presence of a paper in the record which it mistook for the judgment of November 14, 1892. That paper appeared in the place of "Exhibit B," but appears not to have been introduced in evidence unless as a part of Exhibit B. It appears to be a set of findings in the case of McMaster against the Townsite Trustees, but there is nothing to show that the judgment of November 14, 1892, was rendered upon them. The judgment itself might show that they were withdrawn or set aside. The paper is not dated but from the certificate attached it appears to have been drawn up and filed in the clerk's office on or prior to the "11th day of May, 1892" (37), six months before the judgment "*rendered* on the 14th day of November, 1892" (25, 62), which "*decreed*" the title and right of McMaster in and to the lots in controversy (38). McMaster never intended to found any claim of right upon this paper certified to as existing on the "11th day of May, 1892," nor upon the order of the "13th day of October, 1893," apart from the judgment of "the 14th day of November, 1892," to which it specifically referred (38). Certainly, as to this finding of facts and the subsequent order in execution of the judgment,

there was no attempt by McMaster "to piece these two documents together" as in the opinion it is misapprehended. On the contrary, his sole reliance has always been the judgment "rendered on the 14th day of November, 1892," the omission of which from the record, and the futility of discussing its validity and admissibilty in its absence, were pointed out at length in the brief filed in this court on behalf of McMaster on pages 21–22, 10–12. The fact that Judge Irwin in his opinion in the Supreme Court considered the sufficiency of these unauthenticated findings to support a judgment, should not be permitted to prejudice the defendant in error. He had no means of controlling the statements made in the opinion. He consented only that his rights might be adjudged upon the record, and the record simply showed a general finding and judgment in his favor (47–48) based upon a former solemn adjudication, which, although in evidence and before the trial court, was omitted, through inadvertence or otherwise, from the case made by the plaintiff in error.

II.

The opinion of this court shows that the judgment below was reversed for an alleged error in the introduction of evidence, which could not be in the absence of a sufficient bill of exceptions, and it is said that "the record shows a sufficient bill of exceptions." But the record shows only a "case-made," a very different thing from a bill of exceptions, under the provisions of the Oklahoma statutes, borrowed in these respects from Kansas. Okla. Civil Code, 1893,

§§ 311–315, 565–567; *Schumaker* v. *O'Brien*, 19 Kansas, 476, 477; *Herren* v. *Merrilees*, 7 Oklahoma, 261, 266; Brief for McMaster, 18–20. And, although the exceptions stated in a sufficient case-made will be given effect (Civil Code, § 566) it has long been the settled rule in Oklahoma, following in this respect the settled construction of a statute adopted from Kansas, and differing in this particular from a bill of exceptions, that, unless it affirmatively appears that the case-made contains *all* the evidence adduced on the trial, no alleged error in the introduction of evidence can be considered, and that such a defect is not cured by the certificate of the trial judge that it contains all the evidence.

In *School District* v. *Trotter*, 10 Oklahoma, 625, 626–627, the Supreme Court of Oklahoma, by Hainer, J., said:

> "The basis of this action was the contract, which the plaintiff alleges was entered into between herself and the school district, the plaintiff in error. It appears from the case-made that this contract was introduced in evidence, but has been, through inadvertence or otherwise, left out of the record. This court has repeatedly held that where the questions presented to this court for review by the plaintiff in error depend upon the consideration of the evidence introduced upon the trial in the court below, the case-made must contain all the evidence, and this must affirmatively appear in the case-made itself. A mere statement in the certificate of the district judge that it contains all the evidence is not sufficient."

The situation in that case is precisely analogous to the situation in the case at bar. The judgment of November 14, 1892, was the basis of the plaintiff's ac-

tion, and, although it clearly appears to have been introduced in evidence, as heretofore shown, it was, "through inadvertence or otherwise, left out of the record."

To the same effect is *Pierce* v. *Engleheimer*, 10 Oklahoma, 308, 315, and cases cited.

This condition of the record was pointed out and the above authorities were cited in the brief filed on behalf of McMaster in this court at pages 10–12, 19.

The territorial Supreme Court did not pass upon the sufficiency of the present case made, but preferred to rest its judgment on other grounds, and it does not appear that the question was raised or considered. And surely this is not the occasion when this court can be called upon to reverse this settled rule of practice.

Conclusion.

The condition of the record is such that the Court is unable to decide that error was committed, and as the plaintiff in error is responsible for this, to send the case back for a new trial would be to place a premium upon the practice of endeavoring to obtain a review upon a record which covertly omits the vital portion of the case of the defendant in error. In this case, happily, there is enough to show clearly the omission. For these reasons the rehearing should be granted.

Frank McMaster,
By Francis J. Kearful,
Counsel.

FRANCIS J. KEARFUL, counsel for the above named petitioner, Frank McMaster, hereby certifies that, in his opinion, the foregoing petition for a rehearing is well founded and ought to be granted for the reasons therein stated, in order that justice may be done.

WASHINGTON, D. C., March 16, 1905.

FRANCIS J. KEARFUL,
Counsel for petitioner.

Supreme Court of the United States.

No. 137.—October Term, 1904.

The City of Oklahoma City, Plaintiff in Error, vs. Frank McMaster. } In error to the Supreme Court of the Territory of Oklahoma.

[February 20, 1905.]

Mr. Justice Peckham delivered the opinion of the Court.

On the 22d day of September, 1899, this action of ejectment was commenced by defendant in error in the District Court of the Third Judicial District of Oklahoma Territory, in Oklahoma County. It was brought to recover lands situated in a public street in the City of Oklahoma City. Judgment was entered for the defendant in error for the recovery of the land, and that judgment was affirmed by the Supreme Court of the Territory, and the plaintiff in error has brought the case here, both by writ of error and appeal, taking both courses as a precaution, in order to bring the case before us. It was tried by the court, a jury having been waived by the parties, and the defendant in error contends that where a case is thus tried in a Territorial court, an appeal to this court is the only proper proceeding to obtain a review. (Act of Congress, 1874, 18 Stat. 27, ch. .) The contention of defendant is not correct in this case. The manner of reviewing judgments, in civil cases, of the Supreme Court of the Territory of Oklahoma is specially provided for by the ninth section of the act of May 2, 1890, (26 Stat. 81, 85,) providing a Territorial government for Oklahoma, and is not governed by the act of Congress of 1874 (*Comstock* v. *Eagleton*, 196 U. S. 99.) The ninth section of the act of 1890 provides that writs of error and appeal from the final decision of the Supreme Court of the Territory will be allowed and may be taken to the Supreme Court of the United States "in the same manner and under the same regulations as from the Circuit Courts of the United States," and it was held in the above case that final judgment in an action at law in the Circuit Court of the United States, can only be reviewed by writ of error. The assumption that because this case was tried before the court, a jury having been waived by consent, that therefore it ought to go up by appeal, is a mistaken one. In *DeLand* v. *Platte Co.*, (155 U. S. 221,) the case was an action at law where a jury had been waived and trial had before the court. Nevertheless, it was held that, as it was an action at law and the case came from a Circuit Court of the United States, it could only be

reviewed by this court on writ of error. This case must, therefore, be reviewed by writ of error because it is an action at law, although tried by the court upon a waiver of a jury. The record shows a sufficient bill of exceptions, however, and the case is to be reviewed upon the record as thus presented.

Upon the trial, for the purpose of proving the issue upon his part, by means of evidence of a former adjudication, the plaintiff introduced in evidence what he contended was a judgment in his favor for the recovery of the same land in an action in which he was plaintiff and Edgar N. Sweet et al., town site trustees, defendants, and which was entered in the District Court of the Second Judicial District, county of Canadian, Territory of Oklahoma, on or before May 11, 1892, and recorded on the 14th day of May, 1892, in the county of Oklahoma. The plaintiff argued that the defendant (plaintiff in error) in the case at bar was bound as a privy by the adjudication in the former action. The paper was received in evidence by the court, and it is set forth at length in the record. It is evidently nothing but a finding of facts by the judge trying the cause. There was also a paper offered and received in evidence, signed by the trial judge in the same case, and dated the 13th day of October, 1893. This was an order made in the case by him at Kingfisher, in Kingfisher County, and was entered in that county on the 13th day of October, 1893, the day of its date. The order directs the defendant to make, execute and deliver to Frank McMaster, the plaintiff, a trustee's deed, "as decreed by this court on the 14th day of November, 1892, of the following described premises and real estate." It is attempted to piece these two documents together, the finding of facts filed in Canadian County and thereafter recorded in the county of Oklahoma, and the order made in Kingfisher County and filed therein October 13, 1893, and to regard the whole as a judgment. It is plain that there has been no formal judgment entered in the case, and that these two separate documents, filed in different clerks' offices, cannot be pieced together and made a formal and complete judgment. Without a judgment the plea of *res judicata* has no foundation; and neither the verdict of a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and between the same parties, constitute a bar. In other words, the thing adjudged must be by a judgment. A verdict, or finding of the court alone, is not sufficient. The reason stated is, that the judgment is the bar and not the preliminary determination of the court or jury. It may be that the verdict was set aside, or the finding of facts amended, reconsidered, or themselves set aside or a new trial granted. The judgment alone is the foundation for the bar. (*Springer* v. *Bien*, 128 N. Y. 99.)

Without resort to this (asserted) judgment in the action against the town site trustees, it is not urged that the defendant in error made out his case

upon the trial. There was no judgment, and the "finding of facts" should not have been held to be such. For the error in the admission of the so-called judgment the case must be reversed.

We do not decide, even if there had been a technical and formal judgment entered, that such a judgment would be conclusive in favor of the plaintiff upon the trial of this action against the City of Oklahoma City. Whether the plaintiff in error would be regarded as a privy to such judgment, and, therefore, bound by it, it is not now necessary to decide.

The court is, however, indisposed to let the case rest upon the error pointed out. The question will arise upon another trial, as to the right of the plaintiff to recover upon the facts stated in the finding of facts in the action against the town site trustees. We think it proper to now look into those findings simply for the purpose of determining whether, assuming them to be facts, the plaintiff below made out a case which would entitle him to recover the land in suit. The Supreme Court of the Territory is of opinion that he did. Among the facts found on the trial of the case against the trustees are the following:

The trustees, appointed under the act of 1890, May 14, (26 Stat. 109,) entered the land in the local land office at Oklahoma City, September 3, 1890, covering, among other lots, the premises in question, "in trust for the use and benefit of the occupants thereof." A patent from the United States was, on the 1st of October, 1890, issued to the trustees, for the land (covering over 160 acres), which patent was by its terms, in trust for the occupants of the town site, according to their respective interests. At neither date was the plaintiff below an occupant of the land in suit.

Prior to this time, and on the 22d day of April, 1889, the land had been opened for settlement under the proclamation of the President, pursuant to the act of Congress, approved March 2, 1889. (25 Stat. 980, sec. 13, page 1005.) The land in question, together with other lots, was settled upon and occupied as a town site shortly after noon of April 22, 1889, and has continued to be and is still so held and occupied.

A portion of the occupants of the tract, on the 22d day of April, 1889, tacitly agreed to a plat of the land into lots, blocks, streets and alleys, and the plaintiff on that day legally entered upon and occupied the piece or parcel of land, particularly described in the plat as his lots, and being the land recovered by him in this action. Subsequently to such occupancy, and prior to the entry of the land by the trustees, and to the conveyance by the Government to the trustees, a different plat making a different arrangement of streets, etc., was adopted and enforced by the parties occupying the town site. By the latter plat the parcel of land claimed by the plaintiff was thrown into the street called Grand avenue. The plaintiff did not consent, but objected to the second plat, and has never consented thereto or acquiesced therein. He was by the city authorities forcibly removed from

the parcel of ground selected by him, and has since that time been forcibly kept from the occupancy thereof.

On the 21st day of April, 1891, he applied to the trustees of the city for a deed to the lot, but they declined to award it. The City of Oklahoma City has apppropriated the land as a street, and did so appropriate the same long prior to the conveyance of the land by the United States to the trustees. The plaintiff was not an occupant of the tract at the time the United States conveyed the same to the trustees, but it was at the time used and occupied as a street by the city.

On these facts the plaintiff below did not make out his case. There was no unconditional vesting of title to the particular lot chosen by him on the 22d of April, by tacit agreement of some of the settlers, even though a map were made of the land showing the plaintiff in possession of a lot not in any public street of the city. Subsequently to the agreement upon a plat by some of the settlers, and prior to the conveyance to the trustees by the patent from the United States (October 1, 1890), the plat was altered and another plat adopted, by which the lot selected by the defendant in error became a part of a public street in the city. The defendant in error, in common with all others, chose lots upon a site which was intended as a town site, and took his lot subject to the conditions which might thereafter obtain. There was no portion of the Territory of Oklahoma open to settlement prior to the date fixed by the proclamation of the President under the act of March 2, 1889, That date was April 22, 1889. (26 Stat. 1544.) It was provided by the act that after the proclamation, and not before, the Secretary of the Interior might permit the entry of land for town sites under Rev. Stat. sections 2387–2388. The Secretary of the Interior gave no permit for entry of lands for town sites under the act of 1889. Again, the sections of the Revised Statutes plainly refer to an organized State or Territory, and Oklahoma was neither, on the 22d day of April, 1889. It was organized as a Territory May 2, 1890, (26 Stat. 81,) and the special act to provide for town site entries in Oklahoma was not passed until May 14, 1890. (26 Stat. 109.) Regulations for carrying out that act were promulgated by the Secretary of the Interior June 18 and July 10, 1890. (10 L. D. 666; 11 Do. 24.) It may be assumed that on April 22, 1889, it was supposed that the land now embraced in the City of Oklahoma City would be a town site, as it was stated on the argument at bar, and not disputed, that there was at that date a railroad station there, and there was every probability that a town would exist at that site. But there was no law for a present selection of land or lots for town sites on the 22d day of April, 1889. There was but a supposition that land actually selected on that day for a town site would eventually be approved. On May 14, 1890, more than a year after the lands were open to entry, and just twelve days after the act was passed providing for the temporary

government of the Territory, an act providing for town site entries was passed. (26 Stat. 109.) That act provided for trustees, to be appointed by the Secretary of the Interior, who were authorized to make entry for town sites on so much of the public lands, situate in the Territory of Oklahoma and then open to settlement, as might be necessary to embrace all the legal subdivisions covered by actual occupancy, for the purpose of trade and business, not exceeding twelve hundred and eighty acres in each case, for the several use and benefit of the occupants thereof, and the entry was to be made under the provisions of sect. 2387 of the Revised Statutes, as near as might be, and when such entry was made the Secretary of the Interior was to provide regulations for the proper execution of the trust by such trustees, including the survey of the land into streets, alleys, squares, blocks and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the land embraced in such town site, the costs of the survey, the conveyances of lots, and other necessary expenses, including the compensation of the trustees. The maps and plats of streets, etc., to be surveyed were to be approved by the trustees, or they might approve the survey already made by the inhabitants thereof.

It seems, therefore, plain that a mere agreement among a portion of the people selecting lots for or in a projected town site, on April 22, 1889, did not and could not vest an absolute and unconditional title in the persons who thus selected such lots. The persons going on the land on that date and under the circumstances then existing did not have any law for the vesting of title to a lot as within a town site, by the mere selection of land at that time. There was general confusion and there were thousands of people entering the territory embraced within the proclamation, on that date. In *City of Guthrie* v. *Oklahoma*, (1 Oklahoma, 188–194,) the Supreme Court of the Territory, in speaking of these crowds, said:

"They were aggregations of people, associated together for the purpose of mutual benefit and protection. Without any statute law, they became a law unto themselves, and adopted the forms of law and government common among civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonenities; they could not bind themselves by contracts or bind any one else."

The whole thing was experimental and conditional.

The selection of the lots in a proposed town site, made on the 22d day of April, 1889, not being final, neither was the plat or map of the proposed town site, as then, or soon after, agreed upon by some of the people, final or conclusive. The agreement upon the plat or map was liable to alteration; there was no absolute right to any particular lot, as it was subject to future survey. It was all in the air. When thereafter, the

trustees, under the statute, made a survey of the land into the streets, etc., or approved a survey already made, by which the plaintiff's lot was placed in the public street of the city, it was his misfortune, where all had taken their chances, that he should draw a blank. The approval of a survey by the trustees, which placed this lot in a public street of the city, gives to the city the right to the possession of it, and to keep it open as such public street. The plaintiff not being an occupant of the lot at the time that the trustees made entry of the land, nor when the conveyance was made to the trustees by the Government, was not one of the parties included in the statute, which directed the entry for the town sites to be made by the trustees "for the several use and benefit of the occupants thereof."

The Supreme Court in *City of Guthrie* v. *Beamer*, (3 Oklahoma, 652,) has held substantially the same views which we now state in the case at bar. We are unable to see any real difference in the principle governing the two cases, and we think the Beamer case was rightly decided.

The judgment of the Supreme Court of Oklahoma must be reversed, and the case remanded with directions for a new trial.

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.